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THE UNIVERSITY OF ALBERTA

EDMONTON, ALBERTA

Working Paper

MATRIMONIAL SUPPORT

June, 1974

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June 24, 1974

TO ALL READERS:

This letter applies both to our Working Paper on Matrimonial Property and to the enclosed Working Paper on Matrimonial Support. The date for submitting comments on both Working Papers has been extended to October 31st, 1974. This date replaces the two that are set out on the first page of the enclosed Working Paper. We had previously extended to September 1st, the time for comments on Matrimonial Property. Since that extension, requests for a further extension have been made both to the Institute and the government. Because these requests reflect the great interest which the public is taking in the reform of Family Law, and because we are satisfied that the additional time will permit interested persons to make a better analysis of the Working Papers, we have decided to fix the date for comments on both of them at October 31st, 1974.

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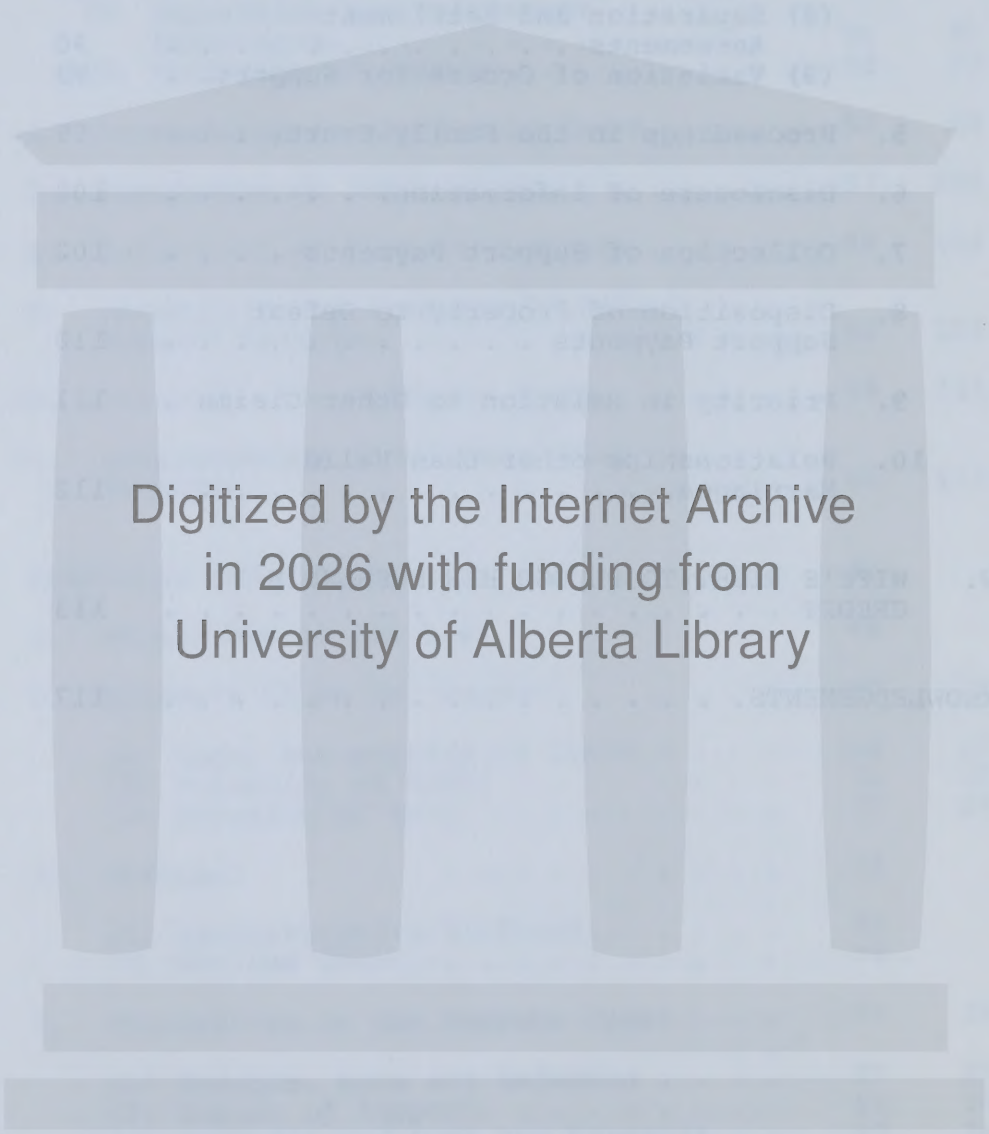
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MATRIMONIAL SUPPORT

WORKING PAPER

PREFACE

The law relating to matrimonial support, like that relating to matrimonial property, must be acceptable to the great majority of married persons. The Institute recognizes the need to be informed as to the attitudes and opinions of those affected. This Working Paper is therefore intended to provoke comment from interested groups and from the public generally.

We have expressed tentative opinions and recommendations on most of the questions raised by the Working Paper. These appear primarily in the part entitled "Proposals for Change". We emphasize that we will reconsider all these tentative opinions in the light of the comments which we receive; we are not in any way committed to them, and will change them if on balance other opinions appear more valid or if other recommendations appear better.

We ask that comments be submitted in the form of a memo or brief and that they be in our hands by October 1, 1974. This is intended to accommodate those who wish to consider this Working Paper together with our Working Paper on Matrimonial Property (comments on which have been asked for by September 1) and those who wish to consider them separately, and also to recognize the importance of getting on with the two projects. Each comment should refer to the page of this Working Paper with which it deals. Of course

we welcome additional comments on points that we have not specifically raised.

Comments should be sent to:

Institute of Law Research & Reform
402 Law Centre,
University of Alberta,
EDMONTON, Alberta.

I. INTRODUCTION

The subject of matrimonial support is closely related to the subject of matrimonial property. The first relates to the claim of one spouse to receive financial support from the other, the second to the claim of one spouse to share in property legally owned by the other. Indeed, in some places the two subjects merge into one another. An order to pay a lump sum secured on property, for example, may in practice have much the same effect as an order to transfer that property. An order under the Family Relief Act, which provides for the support of the surviving spouse, may require a transfer of property from the estate of the deceased spouse.

The subject of the parents' duty to support the child is also closely related to the subject of matrimonial support. A wife or a former wife who is living at home and looking after the children of the marriage is likely to receive a different amount of support than is a wife who is doing neither. The needs of the children affect the amount of money available to support the parents.

We have nevertheless thought it best to issue a number of Working Papers. We have already issued our Working Paper on Matrimonial Property. We are now issuing this Working Paper on Matrimonial Support. We intend to issue a later Working Paper which will deal with the support of children. We will probably issue a Working Paper dealing with the Family Relief Act. We are issuing separate Working Papers in order to get ahead with our Family Law projects and in order to focus attention on different sets of issues which we believe to be suitable for separate consideration.

It might be thought that a new system of rights in matrimonial property, if one is adopted as a result of our study of that subject, would do away with the need for a system of matrimonial support. A spouse needing support will be able to look to his or her share of the matrimonial property. We think, however, that a system of matrimonial support will still be necessary. There will be some cases, probably the great majority, in which the earning power of one spouse is the only substantial asset of the couple, or in which the sharing of their property will not take care of the continuing needs of both.

We believe that the law should differentiate between a spouse's claim to support and a spouse's right to receive part of the matrimonial property. They have different functions to perform and there are different reasons for them. A claim to support depends upon the need of one spouse and the means of the other; a right of property does not. A claim to support may be lost by what happens later between husband and wife; a right of property may not. Take for example the case of a wife who has made a significant

contribution over the years by maintaining a household and rearing the children. If she should then leave the husband and remarry, she will lose her claim to receive support from her first husband. However, if she has a right to an interest in the matrimonial property, her subsequent remarriage cannot take away that interest.

Much of the law relating to the duty of support grew up in very different times. Much of it is founded upon notions of the relation of husband and wife which are no longer universally held, and upon social conditions different from those which exist today. We believe that the law should now be examined in order to see whether it is capable of serving the present and future needs of the people whom it is intended to serve. In this Working Paper we will analyze the law, point out its shortcomings, and suggest ways in which it may be changed.

II. PRESENT LAW

1. Definitions: Alimony, Maintenance, Claimant and Respondent Spouse, Matrimonial Offence

"Alimony" is money which a court orders one spouse to pay for the support of the other spouse during marriage.

"Maintenance" is money which a court orders one divorced spouse to pay for the support of the other divorced spouse after divorce.

The distinction between "alimony" and "maintenance" is confusing. The confusion is increased by the occasional use of the word "maintenance" in statutes providing for payments during marriage, and the use of the word "alimony"

in at least one statute which applies after divorce. The distinction is, however, so embedded in the language of the law that we will sometimes have to use the two words in this Working Paper. We prefer the word "support" or the phrase "payments for support" and will use them whenever they are appropriate.

Traditionally only a wife or divorced wife could claim "alimony" or "maintenance". The new Divorce Act has, however, given the husband or divorced husband the right to claim maintenance upon divorce, and the Domestic Relations Act has been amended to give him the right to claim alimony in other matrimonial actions brought in the Supreme Court. We will in this Working Paper, where appropriate, use the term "claimant spouse" to refer to a husband or wife claiming or receiving payments for support. We will use the term "respondent spouse" for a husband or wife from whom payments for support are claimed or who is making them, though that spouse will not always technically be a respondent in legal proceedings. We will include in these rather awkward terms husbands and wives who have been divorced and also the parties to forms of marriage concerning which declarations of nullity have been made.

There are a number of kinds of conduct between husband and wife which are considered breaches of the duty which one owes to the other. These kinds of conduct have been given legal consequences. They are often called "matrimonial offences" and we will use that term for want of any better. The principal matrimonial offences are adultery, cruelty and desertion, though there are additional ones such as sodomy, bestiality, rape and homosexual acts.

2. Powers of Legislative Authorities and Courts

In some circumstances, the Parliament of Canada has the power to make laws relating to matrimonial support. In other circumstances the provincial legislatures have the power.

(1) Matters under Federal Legislative Authority

Section 91 of the British North America Act gives to Parliament the exclusive power to make laws relating to "Marriage and Divorce". The power to make laws relating to divorce includes the ancillary power to make laws relating to the support of one divorced spouse by another.

Under the divorce power Parliament has enacted the Divorce Act. This Act empowers the Trial Division of the Supreme Court of Alberta, "upon granting a decree nisi," to order either spouse to make payments for the support of the other. It also empowers the court to order either spouse to pay interim alimony while the divorce proceedings are being carried on.

(2) Matters under Provincial Legislative Authority

Section 92 of the British North America Act gives to the provincial legislatures the exclusive power to make laws in relation to matters coming within the class "property and civil rights in the province." That power is understood to include the power to make laws requiring one spouse to pay alimony or provide for the maintenance of the other. Chief Justice Duff in Re Adoption Act, [1938] S.C.R. 398 at 402, for example, held that the subject matter of the

Deserted Wives and Children's Maintenance Act (Ontario) was at that time entirely within the control of the legislatures of the provinces; and the Appellate Courts of Alberta and Manitoba, in judgments which were referred to with apparent approval by the Supreme Court of Canada in Zacks v. Zacks (1973), 35 D.L.R. (3d) 420 at 429, have recognized that, except where they are ancillary to the main issue of divorce, alimony and maintenance are matters of property and civil rights within the exclusive jurisdiction of the legislatures (Whyte v. Whyte (1969), 7 D.L.R. (3d) 7 at 10 (Man. C.A.): Heikel v. Heikel (1970), 12 D.L.R. (3d) 311 (Alta. App. Div.)). Under these powers the Alberta Legislature has enacted the Domestic Relations Act.

Part 4 of the Domestic Relations Act gives the Family Court power to order a husband to make payments for support to his deserted wife. The power exists only while the husband and wife are married, though there is judicial authority to the effect that an order made during marriage may continue in effect after divorce if maintenance is not dealt with upon the divorce. Section 18 permits either spouse to sue the other in Supreme Court for alimony in conjunction with an action for judicial separation. Section 16 permits a spouse who has grounds for judicial separation to sue for alimony alone.

Section 23 of the Domestic Relations Act gives the Supreme Court power to order one party to make payments for support to the other after a declaration of nullity of marriage. There is no reaon to doubt that the jurisdiction still exists and indeed it has been held that it does (Rose (Abroms) v. Rose (1970), 8 D.L.R. (3d) (Ont. H.C.) 45; Liptak v. Liptak (1974), 1 W.W.R. 108 (Alta. S.C.)).

Section 23 also purports to give the Supreme Court power to order either spouse to make payments for support to the other after divorce. Section 11 of the Divorce Act has, however, provided for maintenance of the spouse upon divorce, so that there are two statutes dealing with the subject, one federal and one provincial. The better view appears to be that the federal statute is paramount and overrides the provisions of section 23 (Richards v. Richards (1972), 26 D.L.R. (3d) 264 (Ont. C.A.)). The reason is that the subject of maintenance upon divorce comes within or is incidental to divorce, which is a class of subject to which Parliament's exclusive authority extends. We note that in Bray v. Bray (1970), 15 D.L.R. (3d) 40, Wright J. of the Ontario High Court held that section 11 of the Divorce Act, where it deals with custody, does not oust the existing jurisdiction of the courts under provincial legislation but rather recognizes and adopts that jurisdiction. That reasoning, if valid, might apply to the provisions for maintenance in the same section. However, it appears to us that it is section 11 of the Divorce Act, and not the provincial legislation, which applies to a case where maintenance is awarded at the time of the granting of the decree nisi in the divorce action.

The province has also exercised its legislative powers to enact the Maintenance Order Act, R.S.A. 1970, c. 222, which requires a husband or wife to support a spouse who is disabled in any of a number of ways. This statute, however, appears to be rarely used and we refer to it here only for the sake of completeness. We also mention the obsolete action for restitution of conjugal rights. In it a spouse can claim alimony, and a spouse entitled to it can claim alimony in an independent action; but it is not of practical consequence.

(3) Areas of Doubtful Legislative Jurisdiction

Section 11(1) of the Divorce Act gives the court power to order maintenance "upon granting a decree nisi". Does this mean that the court can order maintenance only at the same time as it grants the decree nisi, or does it mean that upon granting the decree nisi the court obtains a jurisdiction which it may exercise then or at any later time? Three provincial courts have said that if maintenanace is not dealt with at the time that the decree nisi is granted the court has no jurisdiction under the Divorce Act to deal with it later (Daudrich v. Daudrich (1971), 22 D.L.R. (3d) 611 (Man. C.A.); Radke v. Radke (1971), 20 D.L.R. (3d) 679 (Alta. App. Div.); Zacks v. Zacks (1972), 29 D.L.R. (3d) 99 (B.C.C.A.)). Zacks v. Zacks was appealed to the Supreme Court of Canada ((1973), 35 D.L.R. (3d) 420) which held that the use of the word "upon" does not require the trial judge to fix the actual amount if, in the decree nisi, he decrees that maintenance is to be awarded. The court expressed no view on "what the position would be if no claim for alimony, maintenance or custody was made until after a decree absolute was granted, or if an application therefor had been refused when the decree nisi was granted." However, in at least two decisions (Frayn v. Frayn (1973) (unreported); Clarke v. Clarke (1974), 1 W.W.R. 488), the Trial Division has held that Zacks v. Zacks has settled the question in favour of the proposition that once the decree nisi has been granted the court becomes clothed with jurisdiction, which it can exercise then or later, to make an order for maintenance. The judgment of the Appellate Division in Clarke v. Clarke (April 29, 1974, unreported) lends support to these propositions by confirming the award of maintenance made by the trial judge and by saying that the ghosts of the

Radke and Daudrich cases were laid to rest by the Zacks case. However, the court based its decision on the fact that the divorce court had expressly reserved the matter of maintenance for further application; and it went on to say that "had it not been asked for in the petition or had the claim been dismissed at the trial the situation may quite well have been different, in the latter case the respondent could probably only resort to the remedy of appeal." In either of the events mentioned by the court, we think that the law has not yet been finally settled beyond doubt.

The Appellate Division has held that an order for the payment of alimony made in a judicial separation action (which is governed by provincial legislation) has survived a later divorce in which maintenance was not dealt with: Radke v. Radke (1971), 20 D.L.R. (3d) 679; and in the absence of a decision of the Supreme Court of Canada, this is the law of Alberta. It is also the law of British Columbia (Armich v. Armich (1970), 16 D.L.R. (3d) 326 (B.C.C.A.)). It appears, however, that the Ontario Court of Appeal has said that "alimony ends when the marriage is terminated whether by death or divorce." (Summaries of unreported decisions, Part IX (1974) 1 O.R. (2d), p. 65.

(4) Summary of Application of Divorce Act and Domestic Relations Act

The Domestic Relations Act, then, provides for legal proceedings involving support:

(1) during marriage, until a petition for divorce is filed;
(2) after the dismissal of a divorce action (i.e., the Divorce Act applies only if the divorce is granted);

(3) after a declaration of nullity of marriage.

The Divorce Act provides for support:

(1) during divorce proceedings;
(2) after the divorce is granted, if the divorce court deals with the question of maintenance at the time of the decree nisi.

It is not yet clear which Act applies if the court grants the divorce and refuses to award maintenance at the time of the decree nisi or does not deal with it or mention it.

(5) Summary of Existing Court Jurisdictions

Jurisdiction to award support is divided between two courts. One is the Trial Division of the Supreme Court of Alberta, which we will for convenience refer to as the Supreme Court. The other is the Family Court.

The Supreme Court is established by Act of the provincial legislature. It is, however, the highest court of original jurisdiction in Alberta and its judges are appointed by the Governor General under section 96 of the British North America Act.

The Family Court is also established by provincial Act. Its judges are appointed by the Lieutenant Governor in Council.

The Supreme Court has jurisdiction to make orders for support:

(1) Under Parts 1, 2 and 3 of the Domestic Relations Act, in actions for judicial separation and restitution of conjugal rights, in independent actions for alimony and in cases in which a declaration of nullity of marriage is made;
(2) Under the Divorce Act, when a decree nisi of divorce is granted and an order for maintenance is made at the time of the decree nisi.

The Supreme Court may also have jurisdiction to make orders for support after a divorce is granted, either under section 11 of the Divorce Act or section 23 of the Domestic Relations Act.

The Family Court has jurisdiction under Part 4 of the Domestic Relations Act to order a husband to make payments for the support of his wife where proper grounds exist. This jurisdiction exists only during marriage.

Each court has jurisdiction to enforce its own orders for support. In addition, an order made by the Supreme Court may be filed in the Family Court and enforced by the Family Court.

Appeals may be taken to the Appellate Division of the Supreme Court; though under one procedure the first appeal from Family Court orders is to the District Court. A further appeal may be taken to the Supreme Court of Canada, though the leave of the Appellate Division or of the Supreme Court of Canada will usually be needed before the appeal can proceed.

3. Historical Development of the Law of Support

The roots of the law of support reach far back into antiquity. Four thousand years ago the Code of Hammurabi, the King of Babylon, provided for support upon divorce. "If a man has set his face to divorce . . . a wife who has presented him with children, then he shall give that woman her dowry and he shall give her the usufruct of field, garden and property" and she was to have a portion with which to remarry. If the wife was childless, the husband should return the bride-price and dowry. If the wife "set her face to leave, has been guilty of dissipation, has wasted her house, and has neglected her husband", the husband could either send her away with nothing or remarry and retain her as a slave in the house. "If a woman hate her husband, and says 'thou shall not possess me,' the reason for her dislike shall be inquired into." If blameless she should receive back her dowry. "If she has not been careful, but runs out, wastes her house and neglects her husband; then that woman shall be thrown into the water." If she becomes sick, the husband may remarry but is to maintain the wife in his house. "If a woman is not content to dwell in the house of her husband, he shall return to her the dowry she has brought from her father's house, and she shall go."

The law of Moses also provided for divorce and return of the dowry to a wife who was without blame. And upon marriage, the traditional promise of the husband is "I will work for thee and will provide all that is necessary for thy due sustenance as it beseemeth a Jewish husband to do." He takes upon himself "all such further obligations for thy maintenance, as are prescribed by our religious statute."

The Romans also made detailed provision for marriage and divorce and the return or confiscation of the dowry according to the innocence or guilt of the wife.

Marriage in Anglo-Saxon England included something like the sale of the bride to the groom by the family. The bride usually received a form of marriage settlement and an agreement that she would receive property on the husband's death. In later times the husband would promise that he would "keep her according to God's law as a man should his wife"; the promise appears to have been a recognition of the husband's duty to support the wife. Divorce was available by mutual consent or on account of the wife's infidelity or desertion. If she was guilty of infidelity, the husband would take all of her property; if not, she would receive one-half of the joint property if she retained custody of the children, or she would receive the marriage settlement and her own property if there were no children.

After the Norman Conquest, English law was developed by the ecclesiastical courts which came to have exclusive jurisdiction and retained it until the English Parliament passed the Matrimonial Causes Act of 1857. Appeals could be taken to Rome until the time of Henry VIII, and until then it seems that with few exceptions the Canon Law applied.

Where matrimonial offences of various kinds had been committed, the ecclesiastical courts would grant what was referred to as a divorce from bed and board. The decree relieved one spouse of the obligation to live with the other and was similar to a judgment of judicial separation. If a wife had obtained such a judgment and had no means of support, the court called upon the husband to support her.

The ecclesiastical courts would also grant decrees of nullity; such a decree was often used as a vehicle to obtain the result now obtained by divorce. The ecclesiastical courts would grant maintenance to a wife in a nullity action.

The rules relating to support which were developed by the ecclesiastical courts were not unlike those which were included in the Matrimonial Causes Act, 1857 (U.K.). That Act was part of the original law of Alberta. Under those rules, the husband could not reduce his payments for support merely because he had suffered losses through improvident speculations. The court would cut through any assignments of property which the husband might make to defeat his wife. If the wife was a spendthrift, the court would take that into consideration. Because the courts allotted support on a year to year basis, and because they did not like "hoarding", they would not enforce arrears of alimony beyond one year unless there were special circumstances. The wife could enforce payment of alimony through the civil courts, and the ecclesiastical courts had the additional power of excommunication. If the wife had committed adultery, alimony was not available to her.

Throughout the history of England, and until the Matrimonial Causes Act was passed in 1857, a husband or wife could obtain a legal divorce only by private Act of Parliament. Such an Act was effectively available only to the monied class. It was usual to require a husband who was seeking divorce to make some provision for the wife's maintenance.

> One reason for this practice is that, since only a wealthy man could afford to obtain a divorce in this way, there would be no great

> hardship for him to provide for his former wife if she had no means of her own. It has also been suggested that the practice originated because the passage of the Bill would then be less likely to be opposed by the wife's relatives and friends in the Legislature and that it continued because it was thought to be not unreasonable that her husband should make some provision for her, if he had benefit from her fortune or "her defection was accompanied by palliating circumstances".
>
> (Report of the Royal Commission on Marriage and Divorce, 1951 to 1955, p. 132, para. 478)

The English Matrimonial Causes Act of 1857, as amended, was the first statute law of Alberta relating to matrimonial support. Its pattern is reflected in the statute law of today. The Domestic Relations Act, which was first enacted in 1927, added little to the law of support other than to extend it to cover cases of nullity and to make express provision for an independent action for alimony which had already received some judicial recognition. The Divorce Act, which superseded the Domestic Relations Act insofar as maintenance upon divorce is concerned, has made some changes. A wife can be ordered to support her husband. The court may award a lump sum. The Act directs the court to have regard to the "conduct of the parties and the condition, means and other circumstances of each of them" rather than the wife's fortune, the husband's ability to pay, and the conduct of the parties. The court under the 1857 Act and under the Domestic Relations Act had already in appropriate cases exercised its discretion so as to order an aggrieved husband to make payments for the support of a guilty wife.

This is not to say that there has not been a considerable change in the way in which the law is applied. In

recent years there has been a very noticeable reduction in emphasis upon the question whether or not one party or the other has been guilty of a matrimonial offence, and a great increase in emphasis upon the relative needs and means of the husband and wife. The introduction of the lump sum payment in divorce has made a substantial difference in the way support is awarded in cases where the parties have money or property. The once common requirement that a wife must remain chaste in order to continue to receive support payments is now seldom if ever inserted in orders made in Alberta.

One important change should not be overlooked. That is the introduction of the summary procedure under Part 4 of the Domestic Relations Act under which a deserted wife can apply for and obtain an order for support without having to show the formal grounds which would entitle her to some other form of matrimonial relief such as judicial separation or divorce. This procedure does not come from the Matrimonial Causes Act, 1857, but it resembles later English legislation. The 1857 Act had been of very little value to anyone outside the propertied classes; the later summary procedure was available to wives of all income levels, and was largely used by the poorer classes.

Throughout the recorded history of the countries which have most influenced our law, the wife has been in a state of subordination to the husband. At times she has been reduced to something like a chattel. In England until the nineteenth century her husband became the owner of her property. The duty of the husband to support the wife was related to the performance of her duties to him, and in most cases her failure to perform those duties would result in the forfeiture of her right to be supported by him.

The law of support, then, is the result of different historical influences. One is the influence of religious ideas. Another is the notion of the subordination of the wife to the husband which made it seem right that there should be an obligation upon the husband, as the stronger, to look after a well-behaved wife, as the weaker. Then, because the English law gave the husband ownership of the wife's property, it seemed right that the husband should provide for the support of the wife who would otherwise be destitute. Another element is that of the public interest which, particularly before social assistance became generally available, suggested that the wife should not be allowed to become a public charge. With recent changes in the social view of the relation between man and wife, the notion of mutuality of obligation has come into the law, though it has not been fully worked out; marriage in its economic as well as in its other aspects is seen more as a partnership in which the husband and wife sustain themselves and each other to whatever extent is reasonable in view of their circumstances and their way of life. In recent years changing social attitudes have been reflected in changes in the attitudes of the courts. These changes have been much more extensive than the changes in the written law; because of the rather broad terms in which that law was written the courts have been able to accommodate it to the different social attitudes. Because the law has developed under these varied influences it is difficult, if not impossible, to find a rationale for it as it exists today. In approaching the task of assessing the law as it stands at present and as it is administered we believe it necessary to remember that it reflects the elements we have mentioned and that it deals with matters which have been of the deepest social concern throughout the period of recorded history.

4. Spouse's Claim for Support

(1) Legal Recognition of Obligation to Support

The law has long recognized that a husband should provide according to his means for his wife's reasonable needs. The husband's obligation, and the wife's corresponding claim, arise upon marriage. However, while the husband and wife live together the wife's legal remedies are very limited; and if she leaves her husband she is likely to find that she has no remedy at all until she can bring an action for divorce.

Section 197 of the Criminal Code declares that a husband is under a legal duty to provide necessaries of life for his wife, and if the wife is necessitous, permits a charge to be laid for an unexcused failure to perform that duty. The Maintenance Order Act gives a judge power to direct a husband to provide maintenance for his wife in some cases of disability and destitution. These are the only statutory remedies available to a wife living with her husband; they are rarely used and we will not discuss them in this Working Paper. The wife can pledge the husband's credit for necessaries if she can find someone who will extend the credit. This is her only remedy apart from statute, unless there is a matrimonial home and she is recognized as being able to assert a right to stay in it (see our Working Paper on Matrimonial Property, April, 1974, pp. 26-33). These remedies are incomplete.

If her husband deserts her or if she leaves him because of his cruelty or because, without sufficient cause, he does not supply her with food and other necessaries when able to do so, a wife may apply to the Family Court for a

"protection order", that is, an order requiring her husband to provide support. If she commits adultery she will lose her right to make that application. If the husband is "guilty of" certain matrimonial offences, the wife may be able to sue in the Supreme Court for alimony either by itself or in association with a judicial separation. Otherwise the law does not give her any way of obtaining support during marriage. We shall see that the support obligation is recognized in the law relating to divorce and nullity and that the Family Relief Act recognizes it upon death.

(2) Mutuality of Claim

Until recently the law did not require a financially able wife to provide support for her needy husband. The Maintenance Order Act is an insignificant exception to this proposition. The Divorce Act has changed divorce law so as to allow the court to order a wife to make support payments to a husband; and the 1973 amendments to the Domestic Relations Act have made similar changes in the law relating to certain other actions, of which nullity and judicial separation are the most important. Despite these specific changes, the law has not yet recognized a general obligation upon the wife to support the husband in the same way as it recognizes the obligation of the husband to support the wife.

(3) Duration of Duty

The common law recognized the wife's claim to support during marriage. It did not recognize a right to divorce nor an obligation to support a spouse after divorce. These latter rights depend upon statute.

Before 1968, section 23 of the Domestic Relations Act empowered the court to order a husband to make payments for the maintenance of the wife following divorce. Section 11 of the Divorce Act, which in part superseded section 23, empowers the court to order either spouse to make payments for the maintenance of the other after divorce.

The order itself may provide for the termination of support payments. For example, it may provide maintenance for the wife "while chaste", or until her remarriage, or "until she establishes a relationship with a man whereby she was either being supported by him or ought to be supported by him" (see, for example, Heal v. Heal (1973), 12 R.F.L. 196 (Ont. S.C.) and Swalm v. Swalm (1973), 12 R.F.L. 181 (Ont. S.C.)). Limitations of this kind are not customarily imposed in Alberta though remarriage is normally an occasion for terminating periodic payments for support.

We have previously referred to doubts whether the divorce court can make an order for maintenance after divorce if it does not deal with maintenance at the time of the decree nisi. In order to ensure that the support obligation can be enforced at a later date, some judges include in the decree nisi a nominal award of $1.00 for the maintenance of the wife. They do so in order to ensure that if circumstances change the wife will be able to apply for substantial support payments by way of application to vary the $1.00 award. Resort to fictitious awards is not desirable and we believe that the law should be clarified so that litigants will know whether applications for support after divorce can be made under the Divorce Act, the Domestic Relations Act, or neither.

We turn to the question whether a support obligation survives a declaration of nullity. Such a declaration may be made where a marriage is "void" or "voidable".

A marriage may be held to be void as if it had never occurred. An example is a case in which either the husband or wife was already married at the time of the marriage in question. Or a marriage may be held to be voidable, in which case one spouse or both may be entitled to have it annulled, though until the declaration of nullity it was a valid marriage. An example is a case in which either spouse is permanently impotent. The common law did not provide for maintenance in a nullity action.

Section 23 of the Domestic Relations Act gives the Supreme Court power to award maintenance in nullity cases, whether the marriage was void or voidable. It was enacted in 1927 shortly after two Alberta decisions holding that there was no jurisdiction to award maintenance in such cases (Sheaser v. Sheaser (1926), 3 D.L.R. 196 (App. Div.) and Holmes v. Holmes (1927), 2 D.L.R. 979 (S.C.)) and is based upon an English Act of 1907 (7 Edw. 7, c. 12). The courts have developed a general rule that maintenance will be granted in nullity cases when "the sense of propriety and moral justice of the Court" dictates. The rule does not preclude an award in favour of a spouse guilty of legal wrongdoing such as one who was already married at the time of the marriage in question (Ambrose v. Ambrose (1962), 14 D.L.R. (2d) 438 (B.C.C.A.)).

Section 23, as amended in 1973, applies in favour of either spouse.

We turn now to a discussion of the situation which arises upon the death of a husband or wife. Periodic

payments for support will stop upon the death of the spouse receiving support. If the paying spouse dies, periodic payments may or may not stop.

It seems clear that if the Supreme Court orders a spouse to pay alimony under the Domestic Relations Act, the payments will stop on the death of the paying spouse. However, if the court orders the husband to secure payments rather than to make periodic payments, it may provide for annual payments during the lifetime of the spouse receiving support, which may extend beyond the lifetime of the paying spouse. The distinction is made by Howson J. in McLeod v. Security Trust Co. Ltd. (1940), 1 W.W.R. 423. (See however the English authorities cited by Morrow J. in Re Sheppard Estate (1969), 69 W.W.R. 153 to the effect that alimony and maintenance orders cease to operate upon the death of either party.) If the Family Court makes a protection order under Part 4 of the Domestic Relations Act, its power is to "order the husband to pay", and its only power to enforce the order is by committing him to gaol. These circumstances, and the summary nature of the proceedings, suggest that payments will stop accruing upon the husband's death, but this is not beyond doubt.

Section 11 of the Divorce Act allows the court to require the husband or the wife "to secure or to pay" lump or periodic sums. Section 19(1)(d) authorizes the making of rules of court providing for registration of orders "including their enforcement after death". Payments will probably continue to accrue after the paying spouse's death. This appears to be the effect of the decision of the Manitoba Court of Appeal in Huff v. Huff (1971), 16 D.L.R. (3d) 584, and it has been so held by the British Columbia Supreme Court (Re Roberts (1971), 20 D.L.R. (3d)

719) and by an Ontario County Court judge sitting as a Master of the Supreme Court of Ontario (Snively v. Snively (1971), 19 D.L.R. (3d) 628). (See, however the opinion of Morrow J. in Re Sheppard Estate (1969), 69 W.W.R. 153, that all provisions of the Divorce Act are predicated upon the original parties being still alive.) On the other hand, the reasons usually given for holding that secured payments under the Domestic Relations Act continue after the paying spouse's death do not apply to the Divorce Act; the Divorce Act does not provide for orders to pay during the life time of the claimant, and the fact that orders to secure are subject to variation removes any argument that once the security is granted it must necessarily remain in force despite any changes in circumstances.

The Family Relief Act (R.S.A. 1970, c. 134), which is more fully described at pages 11 and 12 of our Working Paper on Matrimonial Property, allows a judge of the Supreme Court to order provision to be made from a deceased spouse's estate for the proper maintenance and support of the surviving spouse. It does not allow him to provide for a divorced spouse, and in view of section 12 of the Domestic Relations Act which says that after judicial separation property "devolves" as though the surviving spouse had been dead, the right of a judicially separated spouse to be provided for from the estate is open to doubt.

The law therefore gives some recognition to a support obligation which continues after the death of the spouse subject to the obligation, but does not do so in a coherent way.

5. Proceedings in Supreme Court

(1) Grounds upon which Support may be Ordered

Under the Domestic Relations Act the Supreme Court may award support in four kinds of action. These are actions for declarations of nullity, actions for judicial separation, actions for restitution of conjugal rights, and actions in which alimony is the only relief claimed. A spouse who wishes to start proceedings for support in that court must be able to prove the grounds for one of these actions.

We have referred to the two kinds of nullity action. In one, the law says that a form of marriage is of no legal effect because of some impediment such as a valid and existing prior marriage to which either the husband or wife was a party. In the other, the marriage is "voidable" because of some serious problem such as the sexual impotence of one spouse; that is, the marriage exists until one spouse sues for and obtains a declaration of nullity. The possible grounds for the other three kinds of action include matrimonial offences, such as adultery, cruelty, desertion, or attempted or actual sodomy or bestiality. The cases in which a spouse may bring action for alimony, either by itself or in conjunction with other matrimonial relief, are therefore limited.

In actions for declarations of nullity, though apparently not in cases of judicial separation, it is open to the court to award support to the spouse against whom the action is brought. The cases in which such awards are made are not numerically important.

It is not enough that the court finds grounds for a declaration of nullity or for an order for judicial separation. In connection with our discussion of the amount of support awarded by the courts, we will discuss the further reasons which the court must find in the circumstances of the husband and wife if it is to make an order for support.

Under the Divorce Act, apart from interim support while a divorce action is on foot, the Supreme Court can make an order for support only if it grants a decree nisi of divorce. Therefore, a husband or wife who wishes to take the initiative to obtain support must obtain a decree nisi and must be able to prove that there are grounds for the court to grant it.

The grounds for divorce are set out in sections 3 and 4 of the Divorce Act. Section 3 involves things which would generally be called "matrimonial offences", though the Act does not use the word. These include adultery, sodomy, bestiality or rape, homosexual acts, remarriage, and cruelty. Section 4 involves proof of a permanent breakdown of the marriage by reason of one or more of certain named circumstances, some of which might be regarded as "matrimonial offences" and some of which are not. These include imprisonment, addiction to alcohol or narcotics, inability or refusal to consummate the marriage for a period of not less than one year and separation for three years (or, in the event of the separation being caused by the petitioner having deserted the respondent, five years).

A husband or wife who is sued for divorce may also claim support from the petitioner. The court has the same discretion as if the spouse claiming support had sued.

In connection with our discussion of the amount of support awarded by the court, we will discuss further the effect of the conduct of the parties and its importance in the circumstances which the court will consider in deciding whether and how to exercise its discretionary power to order support.

(2) Bars and Defences

A claim for alimony under the Domestic Relations Act may be based on the claimant's right to a judicial separation. The court cannot order judicial separation if certain facts are proved ("absolute bars") and it may refuse to order judicial separation if certain other facts are proved ("discretionary bar"). The absolute bars are that the plaintiff spouse is suing on grounds of adultery to which the plaintiff was accessory or at which the plaintiff connived; that the plaintiff has condoned the matrimonial offence complained of; that the plaintiff has presented or prosecuted the claim in collusion with the other spouse; or that the plaintiff has been guilty of adultery which had not been condoned by the other spouse. The discretionary bar is that the plaintiff has been guilty of conduct conducing to the adultery. The complex ideas involved in these difficult and technical words may be summarized by saying that a claimant spouse who establishes a right to support by proving that the respondent spouse has committed a matrimonial offence may lose that right by committing another matrimonial offence (adultery) or by improper conduct in relation to the other spouse's offence or in relation to the lawsuit.

A claim for alimony may also be based upon the claimant's right to a judgment for restitution of conjugal

rights, an obsolete form of court order which requires the husband and wife to cohabit. In these cases, support will be refused if the claimant spouse has been guilty of cruelty, adultery, or other forms of bad conduct, or if the court finds that the action has not been brought in good faith. It is also a defence in such a case that the husband has made a bona fide offer to take his wife back, or that without legal justification she has not offered to return. In other words, the claimant spouse may lose the right to claim support by committing a matrimonial offence. We mention this form of action, however, only because the Domestic Relations Act provides for it. It is, as we have said, obsolete, and we therefore propose not to discuss it further.

Under the Divorce Act there is only one absolute bar to the granting of the divorce. Section 9(1)(b) requires the court to dismiss the petition if it finds that there was collusion in presenting or prosecuting it. If the divorce action is brought under section 3, there is a discretionary bar; if the petitioner has condoned or connived at the conduct of the respondent, then the court is to dismiss the petition "unless, in the opinion of the court, the public interest would be better served by granting the decree."

It is convenient at this point to give a summary of the absolute and discretionary bars in tabular form, omitting reference to the action for restitution of conjugal rights.

	Absolute Bars	Discretionary Bars
Judicial Separation (or independent alimony action based on right to judicial separation)	Claimant was accessory to or connived at adultery	Claimant was guilty of conduct conducing to adultery
	Claimant condoned matrimonial offence	
	Claimant colluded with respondent in bringing action	
	Claimant was guilty of uncondoned adultery	
Divorce	Claimant colluded with respondent in bringing action	Claimant connived at or condoned these matrimonial offence (if action brought under section 3)

Apart from these statutory powers, the divorce court can exercise its discretion to award support to a husband or wife who has committed a matrimonial offence. In a particular case, the court may decide that a claimant who has deserted the respondent spouse or has repudiated the obligations of marriage should not receive support (Naumoff v. Naumoff (1971), 18 D.L.R. (3d) 680 (Ont. C.A.); Hill v. Hill (1970), 2 R.F.L. 377 (Alta. S.C.)); but that is because the court, in the exercise of its discretion, decides that it is not a proper case to award support. The Appellate Division has allowed awards to be made to wives found to be guilty of adultery and mental cruelty respectively (F. v. F. (1970), 5 W.W.R. 732; C. v. C. [1971] 5 W.W.R. 715). In the latter case, the court said that "the mere fact of marriage does not entitle a wife to be maintained after she has been divorced by her husband," but they held that "even a guilty

wife may have a right to maintenance when other matters are taken into consideration."

We turn briefly to nullity actions. As we have said, the Supreme Court can make an order for support when "the sense of propriety and moral justice of the court dictates". Section 23 of the Domestic Relations Act does not set forth any grounds upon which the court should refuse support. While the court's sense of propriety and moral justice may in a particular case dictate that there be no order for support, there is no absolute or discretionary bar set up by the statute.

(3) Amount of Support

It is difficult to obtain and to convey an accurate understanding of the ways in which the amount of support payments are arrived at. The legislation gives the court a broad discretion and few guidelines. In nullity cases, section 23 of the Domestic Relations Act allows the court to order payments which it considers reasonable "having regard" to the respondent spouse's "fortune, if any", his "ability to pay and the conduct of the parties". In judicial separation and alimony cases, section 18 does not give the court any direction, and the court will exercise its discretion judicially and "upon an equitable view" of all the circumstances of the particular case. Section 11 of the Divorce Act allows the divorce court to require payment of sums which it "thinks reasonable", "having regard to the conduct of the parties and the condition, means and circumstances of each of them." All these statutory provisions leave the judge a great amount of freedom to make an order which will be suitable in the

circumstances of a particular case, but the existence of that judicial freedom makes it difficult to formulate an intelligible statement of the ways in which the amounts of support payments are fixed. The reported decisions of the court throw some light on the subject, but the law operates through the thousands of cases which are determined by the courts or settled by negotiations each year.

In Alberta, and probably elsewhere in Canada, the court adjudicates upon support in only a small proportion of the divorce cases which come before it. In the great majority of cases, the parties negotiate and settle the amount of support in advance, and in most cases their agreement is accepted by the court. Much of the negotiation is carried on by the parties' lawyers, who will be guided by their forecasts of what the court would do if the case were to go to court but who have to consider other matters such as the urgency with which one party wants a divorce, the likelihood of remarriage, and the desire of the parties to reach a final settlement.

We are told that where the couple is affluent the periodic support payments are likely to be settled at the amounts which, after tax, may be expected to maintain the wife at the standard of living to which the couple were accustomed, and there will usually be a lump sum to cover the purchase of a house and possibly a car and a reserve for unexpected problems. If there is less money, formulas or rules of thumb are likely to be considered (a third of the husband's net income after providing for the children, or, if the wife is working, two-fifths of the combined incomes; or in some cases, one-half of the net income for wife and children); but the formula is likely to be only a starting point and the ultimate decision is based on common sense

as applied to the case. In such cases of less money there is likely to be a lesser lump sum. If the income and property of the couple are grossly insufficient, the only questions are likely to be: "What can he pay?" and "What will he pay?" The unhappy choice is often between payments which are adequate but which will drive the husband to leave his job, and payments which are inadequate but which the husband is more likely to pay.

There are many other circumstances which will make the award larger or smaller. If the wife has property, she will not need as much support, and if the property has come from the husband his ability to pay support is likely to be reduced. If the wife is earning money she needs less from her husband. If she could earn but chooses not to, the court can take her earning power into account and sometimes does so. If the parties have been married for a long time the award is likely to be higher; although the Ontario Court of Appeal recently said that "alimony is not intended as a form of compensation for services rendered" and approved an award of $2,000 per month against a wealthy husband who had, in effect, repudiated the marriage after three weeks (Casselman v. Posluns (Casselman Estate), Pt. IX (1974) 1 O.R. (2d), Summaries of unreported decisions, p. 65), the judgments of our own Appellate Division in F. v. F. (1970), 14 D.L.R. (2d) 222 and C. v. C. [1971], 5 W.W.R. 752 suggests that past services may be an important factor.

Another factor is referred to by the Appellate Division in C. v. C. [1971], 5 W.W.R. 715

> A third item of importance to be considered is the wife's ability to earn a living. A wife who forsakes her pre-marital career for marriage,

> may prejudice her future prospects for earning a living. If she be too long absent, she may find it impossible to resume her occupation, or if she does return she may find her absence has decreased her likelihood of success. Marriage does not entail such a hazard for the husband. This consideration should not be an unsubstantial item in fixing maintenance for a wife.

If there are children, the court is likely to deduct the cost of supporting them from the combined incomes of the husband and wife and to make some form of division of the remainder between husband and wife; but if she is to receive the payments for the children, the court is likely also to bear in mind the relation between the total of the payments which she will receive and the total needs of herself and the children. If the husband has remarried or is supporting another family, the courts have tended to consider his primary duty to be to the first wife and family, but the notion of easier divorce may be bringing with it a greater acceptance of the second marriage which is a not unlikely consequence of a divorce. The possibility that the wife will remarry is likely to be considered in relation to any proposal for a lump sum, and the amount of the lump sum in turn affects the amount of periodic payments. The health of the parties affects their earning power and is a factor to be considered.

Then there is the conduct of the parties. We are told that nowadays in Alberta less attention is paid to conduct than in the past. Its effect is discussed in two important cases which were decided by the Appellate Division of the Supreme Court of Alberta, which we have called F. v. F. (1970), 75 W.W.R. 715 and C. v. C., [1971] 5 W.W.R. 732.

In F. v. F. the court granted a divorce to the husband on the grounds of the wife's adultery and also granted a divorce to the wife on the grounds of the husband's cruelty. They had lived together for 25 years, having married after 17 of those years, and in that time the husband's net worth had risen from almost nothing to $1,750,000 (though $1,312,500 of this was represented by shares held in escrow under the Securities Act). The court awarded a lump sum payment of $85,000. It also awarded $500 per month to the wife and an additional $250 per month for each of the two children. The court thought the wife should receive less because she was at fault but that, in view of what the husband had amassed, she was "entitled for her past services" to receive enough money to buy a house and a car and to provide a reserve fund. In C. v. C. the court granted the husband a divorce on the grounds of the wife's cruelty. Because of the cruelty it refused periodic payments. However, it awarded the wife a lump sum of $15,000. The court said that

> . . . where assets are acquired during the course of a marriage it seems reasonable that a wife, even a guilty wife, might well claim that it was fit and just that a portion of such assets should be used to maintain her.

In that case, however, the husband's assets of $180,000 had not been amassed during the ten years of the marriage. The court found that the wife's ability to earn a living had not been interfered with. It made the award "in view of the fact that she helped in the store, lent the husband money and the marriage subsisted ten years." These cases show that the idea of the matrimonial offence still exists but has less effect than formerly; and we are told by practitioners that, if anything, the courts are paying more attention to the need for economic adjustment between the

parties and less to their conduct than these two cases would indicate.

At this point we will cite some examples of support arrangements upon divorce which have been determined by court order and by settlement. These have come to us with the facts altered so that identification of the parties is impossible. We do not suggest that any one of them could not have been disposed of differently, but they may be of some assistance as examples of how the system has worked in particular cases. The effective dates are within the past three or four years.

Case #1:

The husband and wife were in their late twenties with three young children. The husband was a poor earner and the wife was on welfare. They agreed on maintenance of $40 per month for each child and the wife received the jointly owned matrimonial home subject to a mortgage to the husband's father covering the portion of the down payment which he had advanced. No maintenance was awarded to the wife, largely because it would be likely to prove uncollectible.

Case #2:

The husband and wife were in their early forties. The husband was in business for himself with earnings of about $9,500 per year. There were two children in their early teens. It was agreed that the husband would pay $200 per month to the wife for herself plus $75 for each child plus medical and hospital insurance and, with regard to the children, reasonable optical and

dental costs. The wife was to have the use of the jointly owned home while the children continued to live with her.

Case #3:

The husband and wife were in their late twenties with two young children. They had been married about 7 years. The husband earned wages of $700 per month and wife earned wages of $350 per month. The court originally awarded $150 per month for the wife and $100 per month for each child, for a total of $350 per month. The court later reduced this award to $100 per month for the wife and $75 per month for each child for a total of $250. The first award would be regarded as somewhat high under the circumstances.

Case #4:

The husband earned a salary of approximately $1,000 per month. The matrimonial home was jointly owned, the wife's equity being approximately $5,000. The husband had other property worth approximately $25,000. There were three children in their early and late teens. The husband agreed to pay maintenance to the wife of $125 per month for herself and $75 per month for the one child remaining at home. The husband also agreed to pay a lump sum of $10,000 secured on husband's interest in the joint tenancy property.

Case #5:

The husband earned approximately $15,000 per year and had an interest in a small private company and an interest in other real property worth $5,000 to $7,000. The husband and wife were joint owners of the matrimonial home with an equity of approximately $17,000. The husband agreed to pay maintenance to the wife of $275 per month and an additional $50 per month for their 20-year old son and $100 per month for their 18-year old son until age 21 or until they became self-supporting. The husband also agreed to pay a lump sum to the wife of $7,500 secured against husband's equity in the matrimonial home and to provide medical and hospital coverage for the children.

Case #6:

The husband and wife were in their mid-thirties with no children. The husband was a professional man earning approximately $25,000 per year and the wife a secretary earning approximately $5,500 per year. The husband agreed to pay the wife maintenance of $200 per month while she was able to work and $300 per month while she was unable to work. The husband also transferred a property in which his interest was approximately $5,000.

Cases where the husband has claimed support from the wife are rare. An example is Cohen v. Cohen (1971), 1 R.F.L. 275; varied (1971), 16 D.L.R. (3d) 241. The husband had transferred property to the wife and subsequently become impoverished. From the wife's assets of $125,000 and

income of $10,000 the trial judge awarded the husband $325 per month, but the Court of Appeal reduced this to $125 per month. Another example is McLeod v. McLeod (1971), 2 R.F.L. 386. The wife earned $9,000 per year. Her husband was paraplegic. He was in receipt of social assistance, but it was thought that he might be capable of becoming self-supporting with retraining. The court refused to make an award of support in his favour. It is probably fair to say that, even though the support obligation is mutual, a court is much less likely to award support to the husband than to the wife.

(4) Periodic and Lump Sum Payments

Under the Domestic Relations Act the Supreme Court has the power in actions for nullity, judicial separation, alimony and restitution of conjugal rights to order one spouse to make periodic payments for the support of the other. The Act does not provide for lump sum payments and, in the absence of an express power the courts have generally held that they cannot or should not award lump sums.

Section 11 of the Divorce Act provides that the court may award a lump sum payment or periodic payments or both. It often does both. The lump sum will most often be awarded for the purchase of a house and car or to give the wife a reserve of capital to fall back on, though as we have seen, the court has upon occasion been influenced by the past services of the wife. The lump sum can presumably be used to compensate a spouse for loss of pension rights or the right to claim under the Family Relief Act.

The Divorce Act does not expressly say that the court can award a lump sum payment in final settlement of support

obligations; indeed section 11(2) provides that "an order made pursuant to this section may be varied". Milvain, C.J. has held that the court has jurisdiction "to award a lump sum settlement in full and complete discharge" of the husband's obligation to maintain his ex-wife (Frayn v. Frayn (1973), unreported), but we do not think that this can yet be treated as settled law.

There are cases in which a payment made once and for all is useful. It avoids future dependency; the divorced wife is impelled to take active steps to look after herself with the aid of the lump sum. Once paid, it avoids the problems of recovering unpaid periodic payments. We are told that the theoretical possibility that a wife might come back later for additional support payments does not seriously inhibit the use of the final lump sum settlements in divorce actions, the prevailing opinion being that the court is unlikely to vary a previous order providing for a final lump sum payment.

(5) Security

If property is put up as security for support payments the claimant spouse can have it sold if the respondent spouse does not pay. Bearing in mind the great difficulties involved in forcing a respondent spouse to make periodic payments, there are cases in which security may be of great value to the claimant spouse. The court has power in divorce and nullity actions to order the respondent spouse to provide security. The consequences of such an order do not appear to be generally understood. We will set out our understanding of them.

Section 32 of the Matrimonial Causes Act, 1857 (U.K.), provided that the court might "order that the husband shall to the satisfaction of the Court secure the wife" certain kinds of payments. The section went on to allow the court to refer "it" (presumably the matter of the security) to Chancery conveyancing counsel "to settle and approve of a proper deed or instrument to be signed by all necessary parties". The court could withhold the divorce decree until the deed was signed. Presumably if the husband refused to sign the deed the court could find him guilty of contempt of a court order and commit him to gaol until he signed.

Section 23 of the Domestic Relations Act, which still applies to nullity actions and which may apply after divorce if the divorce court does not deal with maintenance, gives the court power "to order that either party to the satisfaction of the Court, secure" annual sums to the other. Section 11(1) of the Divorce Act gives the court power "upon granting a decree nisi of divorce" to make an order "requiring" the husband or wife "to secure or to pay" maintenance to the other. While the provisions in the Domestic Relations Act and the Divorce Act are not as elaborate as those in the Matrimonial Causes Act, they appear to contemplate that a satisfactory formal security document is to be prepared and signed by the respondent spouse. Indeed, in Switzer v. Switzer (1969), 7 D.L.R. (3d) 638, McDermid J.A., speaking for the Appellate Division said at p. 643 that section 11 of the Divorce Act

> . . . to my mind contemplates that the Court shall direct the husband to do the things that are necessary to make the security effective and may order him to execute an instrument whereby the sum ordered to be paid is effectively secured on the property.

In that case the court left it to the parties to see to the security, saying at p. 644: "if counsel are unable to agree as to the form of the necessary documents to provide such security the matter may be referred to a Judge of the Trial Division to settle the same."

It appears from Switzer v. Switzer that the order should require the respondent spouse to secure payment of the support payments and that, unless the court approves a form of security at the time, it should require the respondent spouse to provide security in form to be agreed to by the husband and wife or to be settled by the court in the absence of agreement. If the respondent spouse should fail to sign the security, the court would have power to commit him to gaol for contempt.

We understand that some orders purport to charge the property directly (e.g., Swalm v. Swalm (1973), 12 R.F.L. 181 at 186; Frayn v. Frayn (1973), unreported) but it seems doubtful that the court has power to make such an order; its power is to order a party to provide the security.

The procedure suggested in Switzer v. Switzer could in some cases result in a formal security document in the nature of a mortgage or encumbrance of land which could either be registered under the Land Titles Act or protected by caveat. In others it could result in a registrable chattel mortgage or in the deposit of shares or of bonds or other corporate obligations with or without formal security in document form. In Swalm v. Swalm the security was said to be the husband's "estate" but such a form of security appears to be likely to cause great difficulties.

Once the security is perfected by registration or in any other way required by law, the claimant spouse will be able to assert the security against the respondent spouse, the unsecured creditors of the respondent spouse, and the holders of later securities or other dispositions granted by him. Presumably the security would be enforced in the way in which secured claims of the kind involved in the particular case are generally enforced. Switzer v. Switzer contemplated that sale of the property would be a way of enforcing the security.

The next question is whether a secured claim can be enforced only against the property subject to the security or whether the claimant spouse can follow the usual collection procedures, e.g., execution, garnishment, or application to commit the respondent spouse to gaol for non-payment. The authorities say that if the order is only to secure, the respondent spouse has done everything he must do when he provides the security so that the claimant's only remedy is against the property. Under section 23 of the Domestic Relations Act, it does not appear that the court can order the respondent spouse to pay maintenance and also to secure payment of the same sums; the court's power is to order the respondent spouse to secure an "annual" sum and "in addition or in the alternative" to order payment of a "monthly or weekly" sum. Therefore the claimant who takes security will probably be able only to realize on the security. If, under section 11 of the Divorce Act, the court merely orders a party to secure, the same result follows, i.e., the claimant's remedies are confined to the security. It is not clear whether the court, if it wishes, can expressly order the respondent spouse to make payments and in addition to

secure those same payments, so as to give the claimant spouse a remedy both against the respondent spouse personally and against the property upon which the security is given. The Ontario Court of Appeal in Raffin v. Raffin (1971), 22 D.L.R. (3d) 497 at 502, suggested that the additional power to order the husband to secure "may mean to pay and to secure the payments"; and section 11 does give the court the power "to make one or more of the following orders" and may therefore fairly be interpreted as giving the court the power to require the husband to pay and to secure the same sums. However, in Switzer v. Switzer, the Appellate Division said that "the husband . . . is not personally liable to pay the periodic sums where he has been ordered to secure such sums". The court went on to say "In respect to any sum ordered to be paid by the Court but not secured he is, of course, personally liable to pay such sums." However, the court had said earlier in the judgment "The Court may order the husband to pay periodic sums for the maintenance of the children and also order the husband to secure periodic sums for the children." The question whether or not the court may impose personal liability for payment as well as the obligation to secure the same sums was not before the Appellate Division, and it would be open to the court in a future case to base an affirmative answer upon the significant differences between the way in which the Divorce Act deals with security and the way in which the older statutes did so.

In many cases it is important to know whether the court can give the claimant spouse both the right to proceed against the respondent spouse personally and a secured claim against property. Security as an ultimate

means of collection will always be valuable, but it is slow and expensive to realize upon many kinds of security and a claimant spouse, if required to choose between them, may think it better to have the speedier and less expensive remedies which are available against the respondent spouse personally. Even if the security is easily enforceable, the respondent spouse may still be able to cause delay by opposing its enforcement.

In actions of judicial separation the court has no power to require security for support payments. However, under section 21 of the Domestic Relations Act an order for alimony (but not maintenance) may be registered in the Land Titles Office. When registered, it binds whatever interest the respondent spouse has in land in the Land Registration District, and operates as a form of security. The section is defective in that it does not provide any machinery for variation and therefore leaves open the possibility that the order will encumber valuable land and make it difficult to dispose of that land whether or not the protection is needed under the circumstances.

(6) Use of the Matrimonial Home and Household Goods

The right to occupy the matrimonial home and use the household goods is an aspect of the law relating to matrimonial property. It may also be considered as an aspect of the law relating to matrimonial support; shelter is one of the basic needs of the claimant spouse. Therefore, although we have discussed the subject in its property aspects in our Working Paper on Matrimonial Property, we will summarize that discussion here and will later refer to proposals for change in the support context.

At pages 26 to 30 of our Working Paper on Matrimonial Property we discussed the right of the wife to live in a matrimonial home which is owned by the husband or by the couple. We concluded that in Alberta the wife has the same basic right to live in the house that she has elsewhere, i.e., a right against the husband to live in the matrimonial home until he provides alternative accommodation. Her right probably is not valid against third parties who acquire an interest in the house. We pointed out at pages 30 to 33 of that Working Paper that it is doubtful that the wife can obtain an order for exclusive possession against the husband. We referred there to section 10(c) of the Divorce Act which gives the court power in a divorce action to make an interim order "to relieve either spouse from the obligation to cohabit" and to section 12 of the Divorce Act which allows a court in so doing to impose conditions. We also referred to the restraining or non-molestation orders granted by the Supreme Court in divorce and judicial separation actions in order to protect the wife against a serious threat to the safety of herself or her children; these orders sometimes, by prohibiting the husband from entering the home, leave the wife in sole occupation. We concluded by pointing out that in the light of the many cases, most of them from other jurisdictions, it is hard to describe with accuracy the right of the wife to exclusive possession of the home where there are disputes between the parties.

We also pointed out at page 28 of our Working Paper that there is in Alberta no simple procedure for the wife to enforce her right to live in the matrimonial home. Some jurisdictions have such a procedure.

Since our Working Paper was issued, the Appellate Division has delivered its judgment in Clarke v. Clarke

(April 29, 1974, unreported). It upheld the trial judge in refusing to order sale of a jointly-owned matrimonial home, and it may have the effect of establishing the court's discretion to refuse to allow one joint tenant to break up the joint tenancy. The court said that under the circumstances of the case "it is only fair and proper that the appellant should contribute to his ex-wife's comfort and support by leaving her in an undisturbed occupation of the home as long as she is able to do so." It is not clear whether the court intended in that case to give the divorced wife the right to possession to the exclusion of the husband, but it seems likely that it has effectively done so. The judgment may therefore prove to be an important development in the law relating to possession of jointly owned matrimonial homes.

Sometimes the court will make an order which fixes the amount of support at a stated sum on condition that the wife have sole occupation of the matrimonial home for herself or for herself and the children, and settlements are often made on that basis. Such orders are at best an indirect way of giving the wife the actual occupation of the house. They do not give her a legal right which can be enforced other than by applying for an upward variation in the amount of support if she is not left in occupation.

At pages 33 and 34 of our Working Paper we referred to the ownership of things used for household purposes, such as furniture, furnishings, china, silver, paintings, antiques, household appliances, television and stereo sets and the like. We pointed out that unless there is a deed of gift or delivery of a chattel which was owned by one spouse at marriage, the property remains in the original owner; and that if the husband paid for household furniture and effects after

marriage, in the absence of financial contribution from the wife the law will treat him as the owner of the chattels.

(7) Transfers and Settlements of Property

The court has no general power to require one spouse to transfer property to another. In our Working Paper on Matrimonial Property at pages 14-15 we described section 22 of the Domestic Relations Act which appears to give the court power in actions for judicial separations or divorce for adultery (and not for other grounds) to "settle" the property of the adulterous party on the "innocent party" and the children. Until 1973 the section allowed a settlement to be made from the property of a defendant wife only, and not from the property of a defendant husband. The history of the section went back to 1857, and it was not part of a general provision for support but was intended rather to see that the husband and children did not suffer financially through the loss of property belonging to the wife. The word "settlement" involves some arrangement under which the property would be held for the plaintiff's benefit.

We also referred in our Working Paper on Matrimonial Property to the power of the court under section 24 of the Domestic Relations Act to vary ante-nuptial or post-nuptial settlements, i.e., provisions other than absolute gifts made because of the marriage and for the benefit of the parties to the marriage. We pointed out that, since the section has been held not to apply to cases of joint tenancy, there are few transactions in Alberta to which it can apply.

We referred also to section 25 which applies only to actions for restitution of conjugal rights which are rare today. Section 25 gives powers similar to those under section 22 but goes on to allow the court to order that part of the

profits of trade or earnings of the defendant be periodically paid to the plaintiff. As we said in our previous Working Paper, the literal effect of these sections as amended is that the court, in these narrow categories of proceedings, has power to adjust property interests in favour of the innocent party.

In some divorce cases the court will make orders designed to result in the transfer to the wife of property belonging to the husband. One example is the reported case of Wagner v. Wagner (1969), 73 W.W.R. 474. In the divorce action the court awarded to the wife a lump sum somewhat in excess of the husband's equity in the jointly owned matrimonial home and charged the lump sum on the husband's equity. In an action which the wife brought at the same time for partition and sale of the matrimonial home the court ordered that the husband's equity be sold to the wife, presumably at a price equal to the lump sum. Another example is Frayn v. Frayn (1973), unreported. There Milvain C.J. charged an $8,000 lump sum payment upon the husband's share in the $22,000 equity in the couple's jointly owned matrimonial home and directed that if the money was not paid in two months the husband's interest in property would be vested in the wife. Another example is Balderson v. Balderson (1973), unreported. Lieberman J. ordered that a lump sum of $45,000 be charged upon the husband's quarter section and upon his shares in the farm company which the couple owned. Upon payment of the $45,000 the wife would transfer to the husband her share in the farm company.

These orders may be founded entirely upon the court's powers in relation to lump sums and security, or they may be based upon the power to impose terms, conditions and restrictions under section 12 of the Divorce Act. The judgment of the Appellate Division in Switzer v. Switzer (1969), 7

D.L.R. (3d) 638 confines, to some extent, the power of the court to make such orders. There the trial judge had directed that property owned by the husband be sold and that the proceeds be paid to the Public Trustee who was to pay a monthly amount to the wife for the support of the children. The court held that the trial judge was wrong in making that order and referred to an earlier decision under the Domestic Relations Act to the effect that the court could not use an order to secure as a means of depriving a husband of property in order to give it to the wife. The orders in Wagner v. Wagner and Frayn v. Frayn come close to doing that, and until orders of that kind are sustained on appeal there will be some doubt as to whether they come within the powers given to the court by the Divorce Act.

(8) Interim Alimony and Costs

The claimant spouse often needs support while matrimonial proceedings are being carried on. The court can award interim alimony in favour of the plaintiff in actions for declaration of nullity, judicial separation, restitution of conjugal rights, or for alimony alone. The power does not apply "where the plaintiff has from any source whatsoever sufficient means of support independent of the defendant". It has been held that a wife with liquid assets but no income is not entitled to interim alimony (McKenzie v. McKenzie (1965), 51 W.W.R. 182 (App. Div.)).

In a divorce action the court may order either spouse to pay interim alimony for the maintenance of the other. The court is to award what it "thinks reasonable having regard to the means and needs of each of them."

Court decisions have established that the standard of support under the Domestic Relations Act is that the interim alimony should be enough to maintain the plaintiff "modestly and in retirement" until the action has been disposed of. In a recent decision a Local Master in Ontario held that because of the wording of section 10(c) of the Divorce Act the amount awarded need no longer be restricted by the application of that standard (Schein v. Schein (1973), 12 R.F.L. 347). The Ontario Court of Appeal, however, had earlier used the phrase "modestly and in retirement" in dealing with section 10(c) (Kirsman v. Kirsman (1971), 23 D.L.R. (3d) 412).

In Alberta, orders for interim alimony are made upon application in chambers rather than after a trial in court. Being temporary, they are usually made on affidavit evidence and without the thorough investigation involved in permanent awards. We are told that once established, the amount of interim alimony may have some persuasive effect on the mind of the judge who makes the final decision.

Under section 17(1) of the Domestic Relations Act the court, along with interim alimony, may and frequently does make an order for payment of the legal costs being incurred by the claimant spouse in the matrimonial proceedings. The Divorce Act does not make specific provision for interim costs as distinguished from interim alimony. Section 19(c) however provides for Rules of Court respecting the fixing and awarding of costs and Rule 577A provides that "The Court may at any time after a petition for divorce has been presented, and if necessary from time to time, make such order as it thinks fit, for payment of or security for the costs of either spouse." The Rule appears to be broad enough to cover the making of an order for interim costs,

and Professor L. J. Pollock so argues ((1974) 12 Alta. L. Rev. 271). However, there seems to be a difference of judicial opinion which leads to an undesirable state of uncertainty.

(9) Separation and Settlement Agreements

When a husband and wife make a formal agreement to live separate and apart, they usually agree on the support payments to be made and they sometimes agree not to apply to the court to change the amount agreed upon. The question often arises whether they are bound by agreements of this kind or whether the court has power to make a different order. In divorce cases, while the court is likely to attach importance to an agreement voluntarily made by the parties, it has power to order payments for support which are different from those provided for in the agreement. The effect of the separation agreement is suspended while the order for support is in force, but it revives when the order is terminated (see Horne v. Roberts (1969), 5 R.F.L. 15 and authorities therein cited). In cases where a change of marital status is not involved the authorities are divided as to whether the court can make an order for payment of an amount for support different from that provided for in a separation agreement.

If the husband and wife have agreed at the time of the divorce or by an earlier separation agreement on the payments to be made for support they will often want the court to confirm the agreement. The court in some instances purports to incorporate in the decree nisi an earlier separation agreement or minutes of settlement made at the time of the divorce. It is sometimes not entirely clear whether the claimant's rights thereafter depend upon the

order, and there is doubt whether incorporation makes the whole agreement a judgment of the court, particularly as to matters such as the transfer of property over which the court has no jurisdiction.

Support payments cease to accrue upon the death of the recipient. If the agreement does not say what happens upon the death of the spouse making the payments there is a question whether the spouse's estate will have to continue the payments. It has been held that where the agreement is not clear there is no legal principle that says the payments shall continue. It has been held in other cases that an agreement providing for payments during the life of the wife will continue in force after the husband's death. In another case an agreement, though silent as to the effect of death, was held to continue the payments after the husband's death on the grounds that he had substantial assets and had told the wife that she should accept the amount offered (which was less than the court would probably have awarded) because as she said, "it would be for the rest of my life" (Kirk v. Eustace, [1937] A.C. 491 (H.L.); Bennett v. Canada Trust Co. (1960), 31 W.W.R. 311 (B.C.C.A.); see also Horne v. Roberts (1971), 5 R.F.L. 15).

Separation agreements can, of course, provide for divorce, death, and other changes in circumstances, or they can be entered into for fixed terms. In the absence of such precautions they can impose severe hardships on one party or the other.

(10) Variation of Orders

The Supreme Court has power to vary its own orders for support payments. Under section 26 of the Domestic

Relations Act, it can do so on grounds that the means of either party have increased or decreased or that either party has been guilty of misconduct. Under section 11(2) of the Divorce Act, it can do so "if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them." An order for a lump sum under the Divorce Act can probably be varied, though the authorities are few and not conclusive, and there is doubt whether it can be varied to provide for periodic payments or whether an order for periodic payments can be varied to provide for a lump sum. It has been held that a consent order can be varied, though the court is likely to attach considerable importance to the agreement of the parties.

A support payment remains payable until it is paid. However, the courts will sometimes relieve the respondent spouse from the obligation to pay all or part of the arrears, and will often limit the amount recoverable to one year's payments. The view of the English ecclesiastical courts was that support payments are intended for current support and should not be "hoarded". That view still has some effect though there have been cases where wives have done their utmost to collect these support payments and have failed and where other considerations have therefore applied. A statement of the law of Alberta appears in Kergan v. Kergan (1964), 50 W.W.R. 172 where Kirby J. held that the Supreme Court has a discretionary control over arrears of alimony and, because the wife had done little to enforce her right to alimony, reduced the arrears from $6,050 to $600.

6. Proceedings in the Family Court

We now turn to support proceedings in the Family Court.

The Family Court deals with matrimonial support as a separate matter. It provides an alternative procedure not associated with divorce, nullity or judicial separation. The procedure is simpler and can be followed with the assistance of court officials rather than the assistance of lawyers. Most of those who go to Family Court are from groups having lower incomes and many are in receipt of social assistance.

Under section 27 of the Domestic Relations Act a wife may apply to the Family Court for an order that the husband provide support. She must be able to prove that he has committed one of a small group of matrimonial offences. One is that he has deserted her. Another is that he has been guilty of cruelty or has refused or neglected "without sufficient cause to supply her with food and other necessaries when able to do so," and that she has therefore left him. If she leaves the husband for another reason or if the separation is by agreement, or if she has committed adultery and her husband has not condoned it, she is not entitled to an order. In other words, she must prove that her husband has committed one of a small number of matrimonial offences in order to obtain relief, and her own conduct in leaving the husband or in committing adultery may bar her claim.

A husband cannot apply to the Family Court for support. When the Domestic Relations Act was amended in 1973 so as to "work both ways" in the Supreme Court, it was left to operate only in favour of the wife in Family Court.

As we have said, the procedure is simplified. The wife commences a proceeding by swearing an affidavit. All interested parties are given notice to appear in court and the hearing may be commenced without further preliminaries.

The wife usually receives assistance from court officials so that all that she need do is to attend at the court offices to arrange for the commencement of proceedings and for the trial.

Where a wife is receiving social assistance a welfare worker may make the application in the wife's name. We are told however that it is common for a wife receiving social assistance to be asked to make an application and that through the Family Court machinery substantial amounts are recovered from the husbands for the benefit of the Province which has provided social assistance to the wives.

The Family Court can order only periodic payments; it cannot order a lump sum. It cannot order a husband to give security. It has no power to deal with property in any way or to require the husband to transfer property to his wife or to make it available to her. Acting under the Criminal Code a Family Court judge can bind a husband over to keep the peace if he threatens the wife, but the Family Court cannot issue an injunction or a non-molestation or restraining order. It can amend its own orders at any time "upon proof that the means of the husband or the wife have altered in amount" since the making of the original order or of the most recent varying order.

At this point we will cite some examples of orders for support. As in the case of the examples which we have cited concerning orders and settlements in Supreme Court matters, we do not suggest that any of these cases could not have been disposed of differently, but they may be of some assistance as examples of how the system has worked in particular cases.

Case #1:

The order was made in 1968. The husband and wife were in their late 30s and had been married for 20 years. There were 4 dependent children. The wife was receiving social assistance of approximately $440 per month. The husband was earning $350 to $400 per month. The total award to the wife and the children was $125 per month.

Case #2:

This case arose in 1973. The wife was about 30 years of age with three dependent children and not employed. The husband was about 10 years older and earned about $600 per month. The wife received approximately $260 per month social assistance. The court awarded $200 per month to the wife and children. The payments were not being made.

Case #3:

This case took place in 1973. The husband and wife were about 50 years of age. The husband earned $12,000 or more per year. There were three dependent children. The court awarded $175 per month to the wife plus $75 per dependent child or a total of $400 per month. The wife had no other income but received a relatively small amount of capital when the couple sold their matrimonial home.

Case #4:

The husband and wife were in their early 30s. The wife was not employed and there were

three dependent children. The husband was earning $2,000 to $3,000 per month in a professional type of occupation. The court awarded $200 per month to the wife and children, later increased to $300 per month.

7. Disclosure of Information

In order to make proper orders for support, the court needs information as to the means of each spouse particularly the respondent spouse. The customary means of obtaining information are available to the parties. The Supreme Court and the Family Court can compel witnesses to testify and to produce documents, subject to the usual limitations of admissibility. In the Supreme Court, the parties also have available to them the usual pre-trial procedures. One is the right to examine the other party for discovery, that is, to require him to appear before trial to be asked questions under oath as to his assets, liabilities and income. Another is the right to require the other party under oath to list documents relating to these matters and to allow the first party to examine any of them which are admissible in evidence and not privileged. It is generally assumed that one party can require the other to produce the other's copies of his income tax returns.

Our information is that in the summary Family Court procedure it is not usual to have an extensive investigation other than through questioning the husband. Even in Supreme Court examinations for discovery and notices to produce documents are less common in matrimonial proceedings than they are in other kinds of lawsuits. Opinion appears to be divided as to the desirability of greater use of these procedures. We understand from one practitioner that

he believes that they should be used more often in order to avoid the dangers resulting from the incompleteness of available information. Another believes that if a respondent fails to produce the necessary evidence at or before trial, the court will, as it did in Wener v. Wener (1972), 5 R.F.L. 87, make presumptions against him, so that there is rarely any need to compel production of the information.

The law protects some information against claimant and court. An example is the income tax information held by the Department of National Revenue, particularly the respondent spouse's income tax forms. Another is information held by the Unemployment Insurance Commission as to his employment.

In practice, lack of information creates greater problems in the collection process than in the adjudication process. In order to force her husband to pay, the wife must discover where he is. In order to garnishee salary or wages she must know where her husband works and when he is paid. In order to apply to commit him to gaol for non-payment she must be able to find him and disprove his excuses. It is then that the unmet need for information is the greatest. It is an important component of the problem which we will now discuss, the problem of enforcement of support orders.

8. Collection of Support Payments

The holder of an unsecured Supreme Court judgment for the payment of money can take a number of steps to collect his money. The principal procedures are execution and garnishee and these are available to a claimant spouse

when the respondent spouse does not make payments due under Supreme Court orders for support (Kergan v. Kergan (1964), 50 W.W.R. 172).

We refer first to "execution". If a support payment is not made on time, the claimant spouse may prepare and take to the clerk of the court a form called a writ of execution which, in effect, is a direction by the court to the sheriff to seize and sell the goods and lands of a debtor in order to satisfy the creditor's claim under a court judgment. The clerk of the court will sign and seal the writ on behalf of the court and the claimant spouse may deliver it to the sheriff. The sheriff will seize any goods of the respondent spouse which he can find and which are not by law exempt from seizure and will sell them in order to realize the money owing to the claimant spouse, though these procedures are subject to control by the District Court at the instance of the respondent spouse. The claimant spouse may also register the writ of execution at the Land Titles Office and, if the sheriff cannot find goods to seize, may have the respondent spouse's land sold after the writ has been at the Land Titles Office for a year.

We refer next to garnishment. The claimant spouse may arrange for the clerk of the court to sign and seal a garnishee summons directed to a person who owes money to the respondent spouse and may serve the garnishee summons on that person. The person garnisheed must then pay into the Supreme Court the money which he owes the respondent spouse, or enough of it to satisfy the claim and costs of the claimant spouse. Garnishee summonses are most often directed to employers (who owe wages to their employees) and to banks (who owe to depositors the amounts

deposited in their bank accounts). Since the garnishee summons affects only money owing to the respondent spouse at the moment it is served, or wages which are accruing due at that time, another garnishee summons must be issued to attach wages for a later period, and one garnishee summons will not cover support payments which fall due after the date upon which it is signed by the clerk of the court.

These collection methods are sometimes effective. The cost, the delay, and the need to repeat the procedures, however, make them inefficient as means of collecting relatively small periodic payments. The effective use of execution requires information about the location of the property to be seized; and the effective use of the garnishee summons requires information about the respondent spouse and his bank or his employment, and in the latter case, the times when his wages or salary are to be paid. Sometimes the claimant spouse may obtain the necessary information by examining the respondent spouse in aid of execution (a procedure under which the respondent spouse can be required to come to the court house and answer questions under oath about his property and income) but this procedure involves more delay and expense. There are often ways in which the respondent spouse can evade both garnishment and execution. Sometimes the garnishee summons will have the undesired effect of causing the employer to discharge the respondent spouse; section 131(2) of the Alberta Labour Act as amended by section 17, 1972 S.A., Chapter 58, prohibits an employer from dismissing an employee for that reason but we do not know whether the prohibition has proved effective. If other creditors have issued writs of execution against the respondent spouse, the money collected under writ of execution or garnishee summons must be shared with them.

The claimant spouse may register an order for alimony at the Land Titles Office, where it becomes a form of security against land owned by the respondent spouse in the land registration district. Registration of the order is more efficient than the registration of a writ of execution but is effective only if the respondent spouse owns land or has an interest in land. Since it is only "alimony" orders which can be registered, the procedure is not legally available upon divorce or nullity.

Imprisonment or threat of imprisonment is another means of enforcing payment. It is not available to ordinary creditors. It is available to either spouse to enforce Supreme Court support orders. It is available to the wife under an order for maintenance made by the Family Court under Part 4 of the Domestic Relations Act. It is also available in Family Court proceedings to enforce an order made by the Supreme Court and filed in the Family Court.

So far as orders on divorce, nullity or judicial separation are concerned, imprisonment is provided for in the Alimony Orders Enforcement Act. If the respondent spouse does not make a payment, the claimant spouse may have the respondent spouse summoned to appear before a Supreme or District Court judge who may commit him to gaol for not more than a year if the failure to pay is due to refusal or neglect, though not if it is due to financial inability to pay. In the case of an order being enforced by the Family Court, the procedure is similar and the court has the power to commit the husband to gaol for not more than six months. The procedure in Family Court is the same whether the order being enforced is an order made by the Family Court in the first instance or an order made by

the Supreme Court and filed in the Family Court. In the larger Family Court establishments, court officials are available to do the preliminary work necessary to bring the husband into court. Because imprisonment as a civil sanction is considered oppressive, and because imprisonment will often cause the respondent spouse to lose the job which provides the only source from which the support payments can come, judges are reluctant to commit him to gaol.

In summary, support payments under Supreme Court orders may be collected by the usual Supreme Court procedures, principally execution and garnishment, or by imprisonment or threat of imprisonment under the Alimony Orders Enforcement Act or by a similar threat in Family Court if the Supreme Court order is filed there. The only sanction available under a Family Court order is imprisonment or the threat of imprisonment by the Family Court under Part 4 of the Domestic Relations Act.

We are told that one of the greatest complaints, and possibly the greatest complaint, of separated and divorced wives is the difficulty which they have in collecting the payments awarded to them. Their need is to have the money paid regularly and on time so that they can pay for food, clothing and shelter for themselves and their children. The traditional means of collection do not meet this need because they are slow and uncertain; and they are costly in money and effort.

Because the courts are reluctant to put the husband in gaol the threat of imprisonment often lacks credibility. Too often, the husband will give up a job and move away rather than pay and it will be the responsibility of the

wife to find him if she can and to put the legal machinery in motion at his new location, with all the attendant cost and delay. A determined husband will sooner or later defeat the wife if he is willing to suffer loss and inconvenience in order to avoid paying. These complaints are endorsed by the brief of the Law Society of Alberta and the Canadian Bar Association (Alberta Branch) to the Board of Review inquiring into the Administration of Justice in the Lower Courts in Alberta. The existing state of enforcement procedures must be pronounced defective.

We have so far discussed orders which do not provide for security. If the Supreme Court has ordered security upon divorce or nullity, and if the respondent spouse has provided it, the claimant spouse would be able to realize upon the security and thus obtain payment, at least to the value of the security. We are not aware of any special difficulties in relation to secured orders, but it must be borne in mind that realizing upon the security is likely to take time and to involve cost.

9. Disposition of Property to Defeat Support Payments

This topic is related to the topic of collection of support payments. Section 20 of the Domestic Relations Act empowers the court to issue an injunction to prevent "the apprehended disposition by the defendant of his real or personal property." Although the Divorce Act does not confer a similar power, we understand that at least some judges will grant similar injunctions in divorce proceedings; such an injunction may be justified as being based upon the inherent jurisdiction of the court or as a "term, condition or restriction" provided for in section 12(b). The Alimony Orders Enforcement Act empowers the court to commit to gaol

a spouse who disposes of or conceals property to avoid complying with an order for alimony or maintenance, but this power does not of it self enable the court to attach the property. Under an English statute of Queen Elizabeth I's time dealing with fraudulent conveyances, the court has power to set aside a disposition made to defeat creditors; and where there has been default under a Supreme Court order for support, the claimant spouse is probably a "creditor" for that purpose.

10. Priority over Ordinary Debts

Security for support payments appears to give the claimant spouse the same priority as security for any other claim for money. An alimony order registered against the title to land under section 21 of the Domestic Relations Act also appears to give the claimant spouse security against the land.

In the absence of security, the cases say that an unpaid alimony or maintenance payment is an equitable rather than a legal debt (Kergan v. Kergan (1964), 50 W.W.R. 172; Horne v. Roberts et al (1971), 5 R.F.L. 58; see however Re Sheppard Estate (1969), 69 W.W.R. 153 at 197). It has been said to be inalienable and unassignable; and it is subject to discretionary control by the court, which can reduce or cancel it. However, it seems that an unpaid alimony or maintenance payment, if unsecured, ranks equally with ordinary unsecured debts. The claimant spouse in Alberta can issue a writ of execution or garnishee summons and there seems to be no reason why he or she would not be entitled to share pro rata with other execution creditors under the Execution Creditors Act; nor does there seem to

be any reason to think that he or she is not a creditor under the Administration of Estates Act and (unless the court exercises its discretion otherwise) entitled to share pro rata with other creditors of the estate of the deceased spouse. The situation is different in bankruptcy. An order of discharge from bankruptcy does not release the bankrupt from any debt or liability for alimony or maintenance or even under a separation agreement (Bankruptcy Act, s. 148). While the Act does not say that a claim for alimony or maintenance is not a debt which can be proved in the bankruptcy, there is authority for the proposition that in a common law province it is not a provable claim (Re Freedman (1924), 3 D.L.R. 917 (Ont. C.A.)). The advantage in being able to claim against the bankrupt spouse after he is discharged from bankruptcy will, in most cases, outweigh the disadvantage in not being able to share in the assets of the bankrupt estate.

11. Relationships other than Valid Marriage

We have said (page 24) that even though a marriage is void because one "spouse" is married to someone else, the court can and sometimes will award support. However, Canadian courts have generally refused to award support or to give other matrimonial relief to the parties to a "polygamous" marriage, i.e., a marriage under a system of law which permits one of the parties to the marriage to take another spouse at a later date even though the marriage still subsists.

Then there is the case where a man and woman live together, often for a long period of time, without going

through a form of marriage. Arrangements of this kind are often referred to (though the term is not legally correct) as "common law marriages". Alberta law does not recognize that merely because two people have lived together, either has any claim on the other.

III. PROPOSALS FOR CHANGE

1. Objectives of the Law

What are the objectives of the laws relating to support? What are the reasons for it? These questions have not been satisfactorily answered. But it is difficult to assess the adequacy of the law or to suggest a better law without knowing what is to be accomplished and why. We therefore address ourselves to them.

Marriage involves a contract. One possible rationale for the duty of support is that it is a term of that contract. Traditionally, it has been the wife's duty to live with the husband and the husband's correlative duty to support the wife. Since 1968 when the Divorce Act was passed and 1973 when the Domestic Relations Act was amended it may be said that the duties of husband and wife have, at least in part, been made mutual and reciprocal. The mutual rights and duties of marriage on this theory would be the two sides of the contract. They would arise upon marriage even for the benefit of a spouse who became ill or incapacitated soon after the ceremony, though the extent of the duty might still be dependent upon all the circumstances.

A somewhat similar rationale would be that in its economic aspects marriage resembles a business partnership. The husband and wife arrange their lives in accordance with

their own decisions and make economic and other contributions to the marriage in accordance with their arrangements. To the extent that one is more able than the other to make an economic contribution it is for that one to do so. Because of the changes in the position of the parties during marriage and because of the benefits conferred by each, the obligation lasts past the marriage. In many cases, for example, a wife who stays in the home will, over a period of time, become less able to support herself but will make a contribution to the marriage by maintaining the household and rearing the children.

However marriage is more than a contract and more than a partnership. To many people it is a religious sacrament and to everyone it is a relationship of mutual affection and support. Under our law it is recognized as a status which carries legal consequences with it whether or not an individual husband or wife wants them. Another possible rationale is that the law should continue to enforce the support obligation because our society understands it to be a part of the marital relationship.

There is a social interest in the preservation of the family. The family is society's mechanism for the nurture of children. It serves as the basic unit of society and should, so far as possible, be self-supporting. It may be said that for this reason each spouse should be required to support the other.

There is a public interest in keeping down welfare costs. To the extent that one spouse provides support, this objective is achieved, and this may be thought to be a reason for requiring one spouse to support the other.

The duty and the circumstances under which the duty exists would be very different depending on the objectives of the law. If the matter is one of contract between husband and wife, the effect of the conduct of the parties and of the contribution made by each may be different from what it would be if there is thought to be an ulterior public interest in having a spouse supported. A duty arising from marriage itself could take effect upon marriage, but a duty based upon the notion of contribution and conduct might not arise until the contribution had been made. A duty based upon social policy might extend to unmarried couples living together, while a duty based upon contract would not. Examples can be multiplied.

WE INVITE COMMENT as to what the objectives of the law should be.

2. Spouse's Claim for Support

(1) Legal Recognition of Claim

We have seen that while the common law recognizes a husband's duty to provide for his wife, the wife's ability to enforce that duty depends upon a number of statutory provisions and a few relatively ineffective common law rules. The husband's ability to claim support from his wife depends entirely upon statute. The next important questions are whether the law should expressly provide that, subject to qualifications, a husband is under an obligation to provide according to his means for his wife's reasonable needs; whether it should require a spouse receiving support to contribute to his or her own support where possible; and whether it should provide that a wife is under a similar duty to support her husband.

Without any statement of a general duty of support the law could provide for relief in various cases in which a spouse fails to provide according to his means for the other spouse's reasonable needs. It can be said that relief is not needed while the parties are living together. It can be said that it would be a bad thing to encourage husbands and wives to take each other to court while living together; and that any law which would permit them to do so is repugnant to our society's conception of the marriage relation. It might be argued therefore that there should be no general statement of principles relating to a spouse's claim for support but that the law should confine itself to providing relief for cases of need.

But there are arguments to the contrary. Everyone should understand his legal rights and obligations and the law should state them forthrightly. A spouse who is financially at the mercy of the other should be able to point to a law which demonstrates that support is a matter of legal right and duty and not one for arbitrary decision by one spouse. Piecemeal legislation is not likely to give complete relief. Our tentative but not unanimous opinion is that there should be a general legislative statement of the duty to support. One statute should contain all the provincial legislation relating to matrimonial support.

WE INVITE COMMENT.

We turn to the question whether the spouse claiming support should have a duty to minimize the amount needed. In the past, the wife's actual earnings have been considered. Sometimes her potential ability to earn has been considered.

However, the law has been stated in terms of the husband's duty to support and not of the separated or divorced wife's duty to do anything to support herself.

There are arguments that suggest that she should be required to do whatever she reasonably can to contribute to her own support. There is no legal objective to be achieved by allowing a wife to be a passive recipient of support payments if she is able to help herself. Support payments often cause hardship to the husband or to his second family, and there is an element of unfairness in requiring an industrious husband to pay money for the support of a wife who could but does not take paid employment. There is a social interest in policies designed to minimize the extent of dependency and to bring it to an end wherever possible. More important, if the principle of mutuality of obligation is recognized, the wife should be obliged to take her fair share of the burden by making whatever contribution she can to her own support.

We raise for comment these questions: Should a wife claiming support be obliged, as a condition of receiving support, to take training which would enable her to find paid employment? Should she be obliged to take employment which would not normally be undertaken by someone in the income category in which she and her husband had lived? Should the policy of the law be to bring the support relationship to an end wherever it is reasonably possible to do so by emphasizing the desirability of causing the wife to become independent of her husband or ex-husband? A related question is whether a governmental authority should as a matter of policy make special assistance available to train or retrain a wife to become self-supporting.

These questions also apply to the case in which a husband claims support from his wife. To answer them in the affirmative would be to recognize that a major change has taken place in the legal notion of the relation between husband and wife.

WE INVITE COMMENT.

(2) Mutuality of Duty

We have raised the question whether a claimant spouse should be under an obligation to minimize the amount of support needed. The next question is whether the duty to support should be imposed upon the husband and wife alike.

A mutual duty of support raises conceptual difficulties. How can each spouse be under an obligation to the other? Is there to be a claim by one spouse and a counterclaim by the other? We think that these questions can be answered. In any given case the court can determine what are the means and what are the reasonable needs of the husband and of the wife and it can then decide which spouse requires support from the other.

Then it may be said that a law which treats husband and wife the same ignores the economic facts of life. The Ontario Law Reform Commission at page 224 of its Report on Family Property Law dated February 8, 1974, expresses the opinion that, except where he is incapacitated, the husband should be primarily liable for financial provision and that there should be only a limited mutuality of obligation. The economic disabilities of women, they believe, should not be ignored and cannot be altered by legislation. But it

can be said in reply that if the economic position and prospects of women are inferior to those of men the court can take into account the degree to which that economic inferiority affects the wife who is before it. Our tentative opinion is that there should be full mutuality of obligation. British Columbia has made such a provision in its Family Relations Act, 1971, and we are tentatively in agreement with it.

WE INVITE COMMENT.

(3) Duration of Duty

The next question is how long the duty of support should last. We do not doubt that it should last throughout the marriage and that it should survive divorce, though we have raised questions whether the policy of the law should be to try to bring the support relationship to an end when it is reasonably possible to do so.

We turn to a discussion of the effect of the death of the respondent spouse. It may be argued that the marriage vow is understood to last only until death; that the support obligation is very personal; that the respondent spouse has discharged his obligation by providing support during his lifetime. If so, the surviving spouse, particularly if divorced, should not be able to follow the other's property after death.

However the claimant spouse's needs do not disappear because of the death of the other, and it may well be argued that the responsibility for support should continue to attach to the property despite the death of the owner. Our tentative inclination is to this view.

Assuming that the estate should be responsible, there is a question as to how the responsibility should be imposed and carried out. To require an estate to provide for periodic payments over an indefinite period will create great difficulties of administration. Since the court has power to change the payments later the purchase of an annuity may not be a satisfactory solution. In proceedings for support the court cannot adjust all competing claims; for example, there may be a widow or widower or a divorced spouse, and children, all with moral claims to support from an estate which cannot satisfy all their needs. Our tentative opinion is that all support claims would best be dealt with under the Family Relief Act. This suggestion should not give rise to problems in cases of orders made under provincial legislation. The case of divorce is more difficult because of constitutional problems. Our tentative opinion is that the Divorce Act should be amended to terminate the right to support upon the death of the spouse paying support if the surviving spouse is entitled to apply to the court under dependants' relief legislation for maintenance from the estate or if there is no subsisting order for support at the time of death.

If it is the claimant spouse who dies, we are of the tentative opinion that no further payments for support should become payable. We will deal with arrears later in this Working Paper.

WE INVITE COMMENT on these points.

Another question is whether a spouse's rights to support should terminate upon remarriage or, in the case of a wife, if she should not remain chaste. The Divorce Act is silent on these subjects and so is the Domestic

Relations Act. The spouse's need for support may not be terminated by remarriage but we are of the tentative opinion that remarriage constitutes a final repudiation of the previous marriage and its incidents and should terminate the right to claim support. So far as conditions with regard to chastity are concerned, while we think them inappropriate we do not suggest that the statute prohibit the court from imposing them.

WE INVITE COMMENT.

The next question relates to the doubts raised at pages 8-9 whether the Divorce Act allows the court to entertain a later claim for support made after divorce if the decree nisi does not deal with support. We believe that the doubts should be resolved.

It can be argued that support should be dealt with at the time of divorce if it is going to be dealt with at all and that a divorced spouse should not be faced with a claim later. The court should in a proper case be able to achieve finality by refraining from making an award in the decree nisi. It may further be argued that it would be unconstitutional to provide otherwise; Parliament's power to legislate with respect to divorce cannot extend to providing for a later claim unconnected with an order made in the divorce action.

Our tentative opinion, however, is that it should be possible for a spouse to make a later claim. A spouse who does not understand that failure to assert a right to support will result in its loss should not be penalized for his ignorance. The claimant spouse's circumstances may change. The number of reported cases on the point, and

the adoption of the device of the nominal award of $1.00 for maintenance, show that there is a serious problem.

If there is to be a right to apply later, our tentative opinion is that section 11 of the Divorce Act should be amended to give the court express power to award support after divorce as well as at the time of the decree nisi. Provincial legislation should also empower the court to award support after divorce as section 23 of the Domestic Relations Act does now. Such a provision would be available until the Divorce Act is amended and would guard against the possibility that the courts might hold that the proposed amendment to section 11 of the Divorce Act is beyond the power of Parliament.

3. Tribunal

(1) Administrative Tribunal

The next question is whether courts of law should continue to adjudicate upon support matters.

It may be said that the husband and wife should not have to incur the cost and undergo the bitterness of court proceedings; that they should not be subject to the economic effect of possible differences in the abilities of their respective lawyers; and that the tribunal should have a more uniform approach than can be expected from a system where judges spend only part of their time adjudicating upon support matters. Arguments such as these might lead to a conclusion that an administrative agency should be established with power to investigate and decide upon the amount to be paid.

We are not persuaded by these arguments. The legal rights and obligations of the husband and wife are vitally affected, and each should have full right to make his own case. Each should know what evidence has been put forward by the other and should have a chance to test it and counter it. Where the financial position of the parties leaves room for negotiation, it is desirable that the parties settle their own affairs by negotiation, and the participation of lawyers tends more to equalize the positions of the parties than to enable one to obtain an unjustified advantage. The courts are the institutions which traditionally have adjudicated upon the rights of individuals and we do not see any reason to believe that administrative officials would do any better.

WE INVITE COMMENT.

(2) Unified Court

We should refer here to proposals that a new court be established to administer all or most aspects of the law dealing with family relationships. We issued a Working Paper on this subject in April, 1972, and we expect to return to the subject following the completion of a fact finding study which we have commissioned. In the meantime the Ontario Law Reform Commission has issued a report recommending such unified courts. The Law Reform Commission of Canada and the office for the Revision of the Civil Code (Quebec) have also issued Working Papers recommending a unified court. The Manitoba Law Reform Commission has recommended a pilot project to see how such proposals will work and we understand that the project has received federal and provincial approval. The British Columbia Commission on Family and Children under the Chairmanship of Mr. Justice T. R. Berger has launched a somewhat different pilot project with a similar purpose.

In Alberta, where the judges of the Trial Division of the Supreme Court in 1972 expressed disapproval of the suggestion, those preparing the recent submission of the Law Society of Alberta and the Canadian Bar Association (Alberta Branch) to the Board of Review inquiring into the Administration of Justice in the Lower Courts in Alberta found that in the legal profession there was "an overwhelming support for the establishment of a Domestic Relations Court that would deal with family law matters in the first instance," and that the court should be established at the level of the Supreme Court Trial Division.

We believe that our tentative proposals for change in the law of matrimonial support can be accommodated either by the existing court structures or by a new court. The new court, if it should be created, would have the jurisdictions now exercised by the Supreme Court and the Family Court in the field of matrimonial support and would be able to administer them in the same ways or in such better ways as would suggest themselves at the time it is established or as would be suggested by experience.

We will now turn to some matters which should be studied separately in relation to the present jurisdiction and procedures of the Supreme Court and the present jurisdiction and procedures of the Family Court. If the new court should be established, both procedures should be in the same court, but they would have to be treated separately.

4. Proceedings in the Supreme Court

(1) Grounds, Bars and Defences

We first turn to discuss what the court should consider in deciding whether to award support and how much to award.

We have seen that during marriage the Supreme Court cannot award support unless the spouse from whom it is claimed has committed a matrimonial offence. We have also seen that the court cannot award support if the claimant has committed certain matrimonial offences and that it is given a discretion to refuse support if the claimant has done certain other things. A summary in tabular form appears on page 29.

These legal rules help to make the law more certain than it would be if the court had broader discretionary powers; and it may be said that one spouse should not have to support another who has behaved badly in matters important to the marriage relation and who may even be said to have repudiated the obligations arising from that relation. There is, however, an opposing view that the law should not absolutely prohibit the award of support to a spouse who has committed one of a certain kind or kinds of matrimonial offence. That view has been stated by Hofstadter J., an American judge, in Doyle v. Doyle (1957) 158 N.Y.S. (2d) 909 at 911-913

> Alimony should not be a reward for virtue nor a punishment for guilt. The element of fault should be de-emphasized. Fault should not be a bar to alimony except in cases of gross culpability, such as infidelity or abandonment. In most cases neither party is at fault or both are in some degree. Generally, family breakups are not due to specific acts of either spouse, legal fictions notwithstanding. They result rather from general malaise to which both have contributed. Fault usually comes after malaise has set in; it is the symptom not the cause of domestic discord.

Our tentative opinion is that neither the absolute and discretionary bars should apply to awards of support.

If the claimant spouse is not to be required to prove that the respondent spouse committed a matrimonial offence, and if the law is not to provide that certain kinds of conduct will disentitle the claimant to support, what should the court consider? Section 11 of the Divorce Act has supplied one possible answer. The court is to have regard "to the conduct of the parties and the condition, means and other circumstances of each of them" and is then to make such order as it thinks reasonable. The section leaves the court free to look at all the circumstances of the case, including the contribution made by each party to the marriage, financial and otherwise, and all the conduct of the husband and wife, good and bad. The courts are left to work out from case to case the policy upon which they will proceed in giving effect to these factors. British Columbia has enacted a section to very much the same effect (Family Relations Act, 1972, B.C.S., s. 12).

English legislation provides a somewhat different answer. It is section 25 of the Matrimonial Causes Act 1973 (U.K.), formerly section 5 of the Matrimonial Proceedings and Property Act, 1970 (U.K.). It requires the court to consider the following factors:

(a) income of each party,
(b) financial needs of each party,
(c) standard of living of the parties,
(d) age of the parties and duration of the marriage,
(e) physical and mental disability,
(f) contributions to the welfare of the family,
(g) value of benefits that either party will lose by dissolution of the marriage.

Then after this list of factors comes an important addition; the court is to exercise its powers so as to place the parties so far as it is practicable, and having regard to their conduct, just to do so, in the position in which they would have been if the marriage had not broken down.

If we were not concerned to achieve uniformity between the provincial legislation and the Divorce Act our tentative opinion would be that the legislation might well give somewhat detailed directions such as those given by England's section 25. If it did we would prefer to see the conduct of the parties listed as one of the factors rather than given a separate position, so that it would not be taken into account "only if there is some misconduct of a gross and obvious nature", a standard which the English Court of Appeal has said to be the proper standard (Harnett v. Harnett (1974), 1 All E.R. 764 at 768); and we would prefer that the court not be required to try to place the parties in the position they would have been if the marriage had not broken down. Subject to these comments, we would be inclined to prefer the English section. However, we believe it to be important that there be uniformity between the Alberta legislation and the Divorce Act and our tentative opinion, despite our preference for the English legislation, is that the Alberta legislation should take as a model the provisions for maintenance contained in section 11 of the Divorce Act. That section does allow the court to consider all the factors which would be mentioned in more detailed legislation.

Section 11 of the Divorce Act necessarily applies only if the court grants a divorce. We are tentatively of opinion that the law should give the court power to award

support even if it cannot give the claimant spouse other relief such as divorce or judicial separation. This power could be given by a section such as section 12 of the British Columbia Family Relations Act, which allows the court to order support where it "makes or refuses to make an order for dissolution of marriage or judicial separation, or a declaration that the marriage is null and void." The section should also expressly provide that support could be awarded in an action limited to that object whether or not the claimant spouse would be entitled to any other relief.

The cumulative effect of these recommendations would be to give the court power to award support in many cases where it cannot now do so, for example, to a wife separated from her husband by mutual agreement. The recommendations would even allow an order to be made while the husband and wife live together, though we would not expect the court to be disposed in favour of making such an order.

We turn now to actions for declarations of nullity. The Domestic Relations Act treats support upon nullity in the same way as it treated support upon divorce and in much the same way as the Divorce Act now treats support upon divorce. Our tentative opinion is that for support purposes, divorce and nullity should in most cases be treated in the same way, but there is one case in which the court should not have power to award support. That is the case of the claimant spouse who went through a second form of marriage knowing that one of the parties was already married under a subsisting valid marriage. We would not interfere with the court's power to grant support to a spouse who did not know that the marriage was bigamous.

We are tentatively inclined to think that as a matter of precaution provincial legislation should expressly say that the court has power to order support even if it will have to be provided from capital.

Apart from the removal of the remaining bars our tentative opinion is that there is no present need for changes in the way the Divorce Act deals with support. Once the grounds for divorce exist the court has a broad discretion to award support and we do not see sufficient reason to make any substantial changes. The Divorce Act together with reformed provincial legislation would cover all proper cases.

WE INVITE COMMENT.

(2) Amount of Support

We have discussed some proposals which, in a general way, would affect the amount of support. The next question is whether the law should make more specific provision for determining the amount. Should the amount be fixed in some way by law, e.g., a statutory percentage of the combined incomes? Our tentative opinion is that such a law would work injustice because of the differences between cases. Should the statute give precise direction as to how the court should go about deciding the amount? We have already indicated our preference for section 25 of the Matrimonial Causes Act 1973 (U.K.) and (though in the interests of uniformity we do not recommend its adoption) we think that that section gives as much direction to the court as it should be given. Should some specific directions be given, e.g., to have regard to the duty of the husband to his second wife and family? Our tentative opinion is that such directions would hamper the

court in its efforts to arrive at the solution which best fits the facts of the particular case.

However, WE INVITE COMMENT.

(3) Periodic and Lump Sum Payments

The first question is whether the court should have the power to award lump sums in matrimonial proceedings other than divorce. It may be said that the considerations in an alimony or judicial separation action are different from those in a divorce action. It may be that the statistical probabilities of reconciliation are greater and that this greater probability makes a lump sum payment less appropriate than periodic payments. Or it may be thought that anything beyond support for the duration of the order should be reserved for divorce proceedings. However, we are tentatively of the opinion that the court should have the power to award lump sums in all matrimonial proceedings involving support. There may be cases where the claimant spouse should be provided with a house, or where a lump sum would be useful to provide an opportunity for re-training, or where there is some other reason for a lump sum.

The next question is whether the court should have the power to order a final lump sum payment in settlement of the support obligation. We recognize the risk that, because of lack of understanding of present circumstances or future possibilities or because of imprudent money management, the claimant spouse may need more money later. Our tentative opinion however is that, although a final lump sum settlement may work out badly in a particular case, it is in the interests of the husband and wife to be able to make one. The respondent spouse may make extraordinary efforts

to raise and pay a lump sum if the law gives him a guarantee against any further demands. The claimant spouse is free of the uncertainity of collection. There will be no prolonged dependency. The husband and wife will be able to plan their lives without reference to the uncertainties of collecting future payments or to the burden of making them.

Provincial legislation could not bind a divorce court to recognize as being final a lump sum granted in proceedings governed by provincial law. Our tentative recommendation would require a change in the Divorce Act to provide for recognition of final orders which are made under provincial law and declared to be final.

Periodic support payments are generally deductible from the taxable income of the spouse making them, and in fact are included in the income of the claimant spouse. The reverse is true of lump sum payments. Tax laws therefore tend to discourage lump sum payments because the respondent spouse will normally pay income tax at higher rates. If it is decided that it would be good policy to encourage lump sum payments, we would recommend that consideration be given to changing the policy of tax law so that it does not discourage them.

WE INVITE COMMENT.

(4) Security

Our opinion is that the court should be able to continue to order a respondent spouse to secure support payments. The first question is whether it should be able to impose upon a respondent spouse both a personal obligation to pay and an obligation to secure payment of the

same sums. Our tentative opinion is that it should. A secured obligation is better in that the money can ultimately be collected by enforcing the security. However, enforcement of the security may in a particular case be slower and more expensive than collection of an unsecured amount. In the absence of reason to the contrary, the claimant spouse should not, at the time the order is made, have to elect between two kinds of remedies, either one of which may not turn out to be sufficient. If in a particular case there is reason why the claimant spouse should not have the choice of remedy a court can consider it and do what is fair as between the parties. Section 11 of the Divorce Act should be clarified accordingly.

The next question is whether the legislation should provide a better procedure. Our tentative opinion is that it should. A court should have the express power to require a respondent spouse to provide and enter into a proper security. The court should also have the power to make an order which itself charges property with the making of the support payments and, if it does, the order should itself have the effect of security.

Should the court have these powers in matrimonial causes other than divorce and nullity? Our tentative opinion is that it should. In this context we do not see any difference between support after divorce and support in other Supreme Court proceedings.

(5) Possession of the Matrimonial Home

An important question is whether the court should have the power to allow a claimant spouse to use the matrimonial home and household goods and to exclude a respondent spouse.

We will first consider the situation while divorce or other matrimonial proceedings are on foot. There are many cases where the matrimonial home is the only satisfactory shelter which the couple can afford. In those cases there is a strong argument for giving the court power to make an interim order allowing the wife to stay in the matrimonial home until the action is disposed of. The economic argument is often stronger if there are children who also need shelter, and it is often desirable for other reasons to leave the children in their own home. In some cases the claimant wife will have a reasonable fear of physical injury at the hands of the husband, and in may others it would not be reasonable to require her to undergo the strain of living in the same house as the husband. These are arguments for giving the court power to exclude the husband. On the other hand, it may be harsh to allow the wife to live in the matrimonial home and to exclude the husband from property owned by him alone or in which he has a half share by law, and which is his home.

There may also be advantages in awarding exclusive possession to the claimant spouse as part of a final award of support. The same arguments will apply, though they should be more carefully considered where the effects of an order will be of longer duration. In some cases it may be possible to do justice by allowing the respondent spouse to provide cash support which will enable the claimant spouse to obtain living accommodation elsewhere. We note here that if the property is jointed owned and the court refuses partition or sale there is a risk that husband or wife will die and that the right of survivorship will unfairly take away the deceased's right of ownership; but we think that the place to consider that problem is in our project on matrimonial property.

WE INVITE COMMENT.

(6) Transfers and Settlements of Property

As we have said, Canadian courts do not have a general power to order one spouse to transfer specific property to the other. The normal power is to require one spouse to pay money to the other. The court's powers under sections 22, 24 and 25 of the Domestic Relations Act have been little used in the past and despite the amendments made in 1973 are still limited in scope.

Sections 24 and 25 of the Matrimonial Causes Act, 1973 (U.K.) which we have mentioned at p. 79, give the English High Court the power to order that property be transferred or settled for the benefit of a spouse who otherwise has no legal right of ownership in it. Our tentative opinion is that the Supreme Court should have such a power. We are satisfied that there are cases where it would be better to require a transfer of property than the payment of money. For example, a transfer of property in the proper case would make the matrimonial home fully available to the wife, and there may be cases where it would be better for the respondent spouse to transfer property than to have to dispose of it in order to obtain money for a lump sum payment. The court should not have to proceed by indirect means to obtain such a result.

The need for such a power is less clear for a marriage which has not been brought to an end. Our tentative opinion, however, is that the court should have the same power in matrimonial proceedings other than divorce, though we would expect it to use the power much more sparingly.

We also tentatively believe that if by court order a settlement or trust is set up so that property or the income from it is available for the support of a spouse the court should be able to vary the terms of the settlement or trust unless the order was specifically declared to be final. Outright transfers of property to a spouse should be final.

The next question is whether the court should have power to vary ante-nuptial and post-nuptial settlements. The Divorce Act does not give such a power, which may indicate that the matter is not one of great practical importance and, as we have pointed out, there are few transactions in Alberta to which it would apply.

Our tentative opinion, however, is that the court should have power to vary settlements made by the husband and wife but not gifts or bequests from other parties, and that it should be able to exercise the power upon divorce and also in other matrimonial proceedings. There should also be a power to vary or extinguish settlements and to vary the varying order unless the court declares the varying order to be final.

WE INVITE COMMENT as to these points in relation to divorce and also in relation to other matrimonial proceedings.

We return to the English legislation in order to discuss the different approach which it takes to the economic arrangements to be made between husband and wife upon divorce, nullity or judicial separation, an approach which is also taken by New Zealand legislation.

As we have said, we believe that the law should differentiate between a right to receive property and a

right or a claim to be supported. A right to property, once acquired, is not usually lost by reason of such later events as the remarriage or marital misconduct of the spouse claiming the right. The right may not depend upon the relative means and needs of the husband and wife. A right to support may be subject to all these things.

The English and New Zealand legislation, however, directs the court to have regard to the same factors in dealing with matrimonial property as it does in dealing with matrimonial support. The effect is to give the court a broad discretion to effect a general economic adjustment between husband and wife based on all factors of the case. Our tentative opinion is that property rights should first be determined and that support should be dealt with in the light of the resulting economic position of the parties but we raise for discussion the alternative approach in the English and New Zealand statutes.

WE INVITE COMMENT.

(7) Interim Alimony and Costs

Our tentative opinion is that the existing provisions in the Domestic Relations Act, which give the court a broad discretion to order either spouse to provide support to the other while divorce or other matrimonial proceedings are on foot, are satisfactory. We are not entirely satisfied with a standard which restricts the amount of interim support to what is necessary to enable the claimant spouse to "live modestly and in retirement". However, our impression is that the courts made adequate awards of interim alimony and we do not think that we should recommend a change in an area in which the law is working satisfactorily.

We are also of the tentative opinion that the court should in all cases have the power to award sums to cover the costs being incurred by the claimant spouse in prosecuting the proceedings, and that the Divorce Act should be clarified to put this power beyond doubt.

WE INVITE COMMENT.

(8) Separation and Settlement Agreements

The next question is whether the court should have power to award or deny support contrary to the terms of a separation agreement between the husband and wife. The considerations which we discuss will apply also to agreements in which matters of support are settled for the purposes of matrimonial litigation.

A separation agreement is a contract and the law, for good reason, usually enforces contracts in accordance with their terms. The law also encourages a settlement of claims by agreement rather than by lawsuit. These considerations suggest that the terms of a separation agreement should be binding. The question is whether there are overriding reasons why the court should not be compelled to give full effect to those terms.

The bargaining positions of the husband and wife are often unequal. The wife may accept too little because she is in need and does not want to go to court. Either the husband or the wife may accept unreasonable terms in order to persuade the other to agree to a divorce. Either husband or wife may be too upset to care what is signed. The agreement may have been appropriate when signed but may not have provided for changes in circumstances, e.g., divorce, death, financial losses or gains by the husband, or increases in the wife's needs. Another consideration

may be the subsequent conduct of either party, e.g., adultery by either party or the bringing of a divorce action.

Our tentative opinion is that either party should be entitled to seek a variation of the agreement, either by arbitration if agreed to, or by legal proceedings. To obtain a variation, the applicant should have to show that the agreement was unfair or that there has been a substantial change in circumstances rendering it unfair for the one spouse to have to perform his obligations unmitigated, or for the other to have to accept the amounts agreed upon. Such changes would include a substantial change in the needs of the claimant spouse or in the means of the respondent spouse. The court would have much the same discretion as it has upon an application to vary an order for support made by the court. The court would in a proper case have the power to terminate the support obligations in the separation agreement.

Some separation agreements say that support payments will terminate if the wife does not remain chaste. Should the court be empowered to delete such clauses? We have not formed a tentative opinion upon this question. Then there is a series of questions similar to those which we have raised at page 70 of this Working Paper. Should the wife (or husband) be obliged, as a condition of receiving support, to make whatever contribution she can to her own support? Should she be obliged to do any of the things suggested at page 70? Should the court upon an application to vary a separation agreement be entitled to require her to do so and to fix the support payments accordingly? Again, we have not formed a tentative opinion upon these questions.

The next question is whether payments under the separation agreement should continue after the death of the spouse making the payments. Our tentative opinion is that if the agreement expressly deals with the situation it should govern; and that if it does not, the survivor should have his or her rights under the Family Relief Act, which should provide for even a divorced spouse if the survivor was being supported by the deceased spouse. This opinion is subject to a dissent by one member of the Board who believes that the support obligation is personal and that there should be no obligation upon the estate of a deceased spouse to support his divorced spouse.

Then there is a question as to the effect of an order for support in a divorce or other matrimonial action. Should the law say that the court order overrides the separation agreement? We tentatively think that it should. Should the law say that the agreement remains alive but suspended during the currency of the maintenance agreement? Our tentative opinion is that if the court either makes or refuses an order for support, the support provisions in the separation agreement except with respect to arrears should be automatically terminated and be incapable of being revived. If the court does not deal with support, the separation agreement should continue in force in accordance with its terms, but subject to any power which the court may have to vary it. One of our members dissents. He would treat the separation agreement as extinguished only if the court expressly terminates it. He believes that such a provision would encourage the parties to bring the agreement to the attention of the court.

Sometimes the husband and wife become reconciled. There is then a question whether the separation agreement should come to an end or whether it should continue to exist so that it can be enforced if the parties separate again. We are of the tentative opinion that it should terminate. Perhaps resumption of cohabitation for more than 90 days with reconciliation as its purpose could be the evidence of reconciliation. This would correspond with the Divorce Act's test for condonation.

There may be cases where the husband and wife wish to agree upon a final settlement of all support obligations, usually but not necessarily for a lump sum or property settlement. We are of the tentative opinion that the law should be changed to permit such an agreement. We think that the parties should be able to secure the benefits of finality and that these benefits outweigh the risk that the claimant spouse may need more money later. Our reasons are the same as those which appear at pages 83-84 of this Working Paper in relation to support orders and this tentative recommendation would also require an amendment to the Divorce Act. To guard against improvident agreements we would require the approval of the court to all such agreements.

WE INVITE COMMENT.

(9) Variation of Orders for Support

It is, we think, beyond doubt that the law should provide for the variation of orders for support. Our tentative opinion is that the court should have power to vary an order for support, but only when there is a

subsequent change in the circumstances which the court was required to consider. Section 11(2) of the Divorce Act, which we have described at page 53, accomplishes this objective; and if the provincial statute generally follows section 11(1) of the Divorce Act, it should also follow section 11(2). If the provincial statute makes a different statement of the circumstances which the court is to consider upon the original application, then the power to vary should arise upon a change in those circumstances. The court should also have the power to vary an order for security, and to vary the terms of the security itself.

There is a question whether a court should have power to direct repayment of support payments which should not have been received. The English Law Commission recommended that periodic payments made in excess of those which should have been made should be recoverable, and section 33 of the Matrimonial Causes Act, 1973 (U.K.) gives the court power to order repayment, a power which the Commission had no doubt

> . . . will be exercised sparingly and only where the court is satisfied that the change in circumstances is such that the payee should have realized that she ought to inform the payer of it and deliberately failed to do so.

Our tentative opinion is that the Supreme Court should have a similar power in divorce and other matrimonial causes, although we think that the law should permit repayment to be ordered only in cases where it would be unconscionable that the payments be kept, for example, a case where a divorced wife has concealed from her ex-husband the fact

that she has remarried or that she has received a substantial inheritance that would affect her need for support.

We turn to the vexed question of arrears. Should the court continue to have a discretionary power to wipe out arrears? Our tentative opinion is that it should have this power in divorce and other matrimonial proceedings. In some cases it will be fair to relieve a respondent spouse who was unable to pay but did not apply to vary because he was not pressed by a claimant spouse who was able to provide for herself. In others, it will be fair to require the respondent spouse to pay a claimant spouse who was in need but who was unable to compel the respondent spouse to pay. The court should be able to look to the facts of each case. In order to guard against the use of accumulated arrears as a weapon, we tentatively think that without leave of the court no writ of execution or garnishee summons should issue for a payment in arrears for more than one year. We tentatively think that the court's power to relieve against arrears should extend to cases where either party has died.

WE INVITE COMMENT on these matters.

5. Proceedings in the Family Court

Our tentative opinion is that it is necessary to have a simple, inexpensive and expeditious procedure by which a wife can obtain an order for support. At the present time the Family Court is the appropriate court for that procedure; but even if a new court is established with jurisdiction in all family law matters a summary procedure such as that provided for in Part 4 of the Domestic Relations Act should be available in the new court.

The next question is whether a husband should also have the right to apply under the summary procedure. He can apply for support in divorce and in other Supreme Court matters. We see no reason why, if the duty of support is mutual and reciprocal, a procedure available to one spouse should be denied to the other. A husband might be incapacitated or out of work when the wife is not. In some families, the wife is the one who earns all or most of the couple's income. Our tentative opinion is that a husband as well as a wife should be able to obtain support by the summary procedure.

Assuming there is to be a summary procedure, upon what grounds should the court be able to exercise jurisdiction? The present Act allows a wife to apply when she is deserted in the usual sense or when she is living apart from her husband whether on account of his cruelty or on account of his "refusal or neglect without sufficient cause to supply her with food and other necessaries when able to do so." While the legal theory is that the wife can apply only when her husband has been guilty of marital misconduct of one of the kinds mentioned, we are told that in practice the court does not require unduly high standards of proof of desertion.

Should the grounds upon which the Family Court may award support be identical to the grounds upon which the Supreme Court may award support? There are arguments in favour of uniformity. A litigant's rights should not be one thing in one court and a different thing in another; such differences may lead to forum-shopping and disrespect for the law. It may be said in reply, however, that different considerations may apply in the two courts.

Marriages involved in Supreme Court proceedings are more likely to have finally broken down than those involved in Family Court proceedings. The summary procedure is intended to give quick temporary relief and the applicant should not have to provide extensive proof of grounds for jurisdiction. If an appeal by rehearing on the merits continues to be available, the need for preliminary steps and more formal procedures may be given somewhat less emphasis and the need for cheap and speedy relief may be given somewhat more emphasis.

The English Law Commission has recently made a provisional recommendation that an English spouse should be able to apply under a summary procedure to a magistrate's court on the grounds:

(a) that the respondent has failed to provide such maintenance for the applicant or for any children as is reasonable in all the circumstances; or

(b) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or

(c) that the respondent is in desertion.

Our tentative opinion is that once the applicant has demonstrated the need for support, the Family Court should have jurisdiction to order support. It would no longer be necessary to prove desertion, cruelty or failure to provide, nor would the defence that the wife has committed adultery be available to husbands. We are especially anxious to

receive opinions as to whether a recommendation based upon that opinion would be likely to provoke a deluge of applications which would have an adverse effect upon the operation of the Family Court system.

Once the Family Court has jurisdiction, what effect should it give to the conduct of the husband and wife? We suggest that it should have regard to that conduct. There may be circumstances under which a claimant spouse who is in need should nevertheless be refused support. For example, the English Law Commission doubts "whether it would be acceptable to public opinion to require a husband to maintain a wife who had abandoned him for a penniless lover." Our tentative opinion is that the effect of the conduct of the husband and wife on the amount of support should be substantially the same as it would be in the Supreme Court.

WE INVITE COMMENT on these matters.

We think that the Family Court must continue to have its present power to order periodic payments. It is possible to argue that the power should be limited in absolute amount, or that it should be limited to enough to provide the claimant spouse with the necessities of life. These arguments would be based upon the temporary nature of the relief and the notion that a court acting in a summary way should have only limited powers. Our tentative opinion is that there should be no limitation of this kind. We also tentatively think that the Family Court should be able to vary its own orders for support whenever there has been a change in the needs or the means of husband and wife, and that it should have power to wipe out all or part of any arrears.

The next question is whether the Family Court requires some powers now available only to the Supreme Court. Our tentative opinion is that a summary procedure of the kind under discussion is not suitable to deal with such matters as lump sum payments and the title to or possession of property, and that we therefore should not recommend the extension of the jurisdiction of the Family Court to cover these matters. Nor, for similar reasons, do we think that the Family Court should have power to order support in an amount different from that provided for in a subsisting separation agreement between the husband and wife.

Should the Family Court in these summary support proceedings have the power to order the respondent spouse not to molest the claimant? We have described the exercise of such a power by the Supreme Court at pages 31-33 of our Working Paper on Matrimonial Property. We understand that Family Court judges hold appointments as magistrates and in that capacity have the power under section 745 of the Criminal Code to bind over a spouse to keep the peace if there is reason to fear that he will cause personal injury to the other spouse. It may be argued that this is sufficient and that the power to issue what amounts to an injunction enforceable by committal to gaol should be reserved to the Supreme Court. On the other hand it may be that there are advantages in a procedure which can put a restraining order in a wife's hands in a matter of hours in a case where she is physically threatened, and there are parts of the province where Family Court judges are more readily available than Supreme Court judges. We are divided on the question whether the Family Court should have a power to issue a non-molestation order and we therefore do not express any tentative opinion on it.

WE INVITE COMMENT on these matters.

Another question is whether the existing Family Court should have power to vary orders for support granted by the Supreme Court and filed in the Family Court for enforcement. At the present time it does not have the power to do so. However, under the 'show cause" procedure, it does have a discretion whether or not to commit the husband to gaol for non-payment under a Supreme Court order, and we are told that it often refrains from committing the husband on terms which do not require him to pay in full under the Supreme Court order. The effect is that the husband in fact pays less, and the practical effect is much like a variation of the Supreme Court order, though legally the arrears continue to mount up and can be enforced under Supreme Court procedures unless the Supreme Court varies the order.

There is much to be said for giving the greatest latitude to the court which is dealing with the matter at any given time. That argument would suggest that the Family Court should have the power to vary a Supreme Court order to suit the circumstances which it finds at the time of enforcement proceedings. We have some difficulty, however, in suggesting that orders of the court of general trial jurisdiction should be capable of amendment by another court.

WE INVITE COMMENT.

6. Disclosure of Information

We have mentioned the problem of obtaining the information which is necessary to assist the court to make a proper award of support. In some cases it would be

very useful to be able to obtain information from the respondent spouse's employer without having to require him to attend under subpoena. Our tentative opinion is that both the Supreme Court and the Family Court should be empowered to require an employer to furnish a written statement of salary or wages.

A more difficult question relates to such records as income tax returns and Unemployment Insurance Commission information which would be useful in making an award and also in effecting collection of support payments. Should the court or the other spouse be able to obtain that information for use in support proceedings? Certainly, the respondent spouse's income tax return would be most useful to the claimant and to the court and there may be cases where he cannot be compelled to produce it. On the other hand, even apart from any difficulties resulting from the fact that the Income Tax Act and the Unemployment Insurance Commission are federal matters, there are arguments in the other direction. The functioning of the Income Tax Act may well be impeded if tax returns are not kept confidential (see however the opinion of the Federal Court of Appeal in Minister of National Revenue v. Huron Steel Fabricators (London) Ltd. (1973), 41 D.L.R. (3d) 407). We do not at the moment recommend that the law be changed to require income tax authorities to disclose confidential information at the request of the court or of the claimant spouse.

In many cases it is difficult to locate the husband in order to collect support payments from him. In some cases, the police or government officials know where he is living or working. We are tentatively of the opinion that the court should have power to order them to disclose to the court information as to the husband's location and also as

to his financial position. In exercising the power the court should have regard to the interest which the wife has in obtaining the information and any interest which there may be in keeping it confidential, such as the public interest or the husband's claim to privacy. We are not suggesting the task of locating or investigating his financial position, but if they know where he is or if they would normally look for him at the request of the wife, we tentatively think that it should be possible for them to give her any information which they have or which they obtain.

WE INVITE COMMENT.

7. Collection of Support Payments

It is easy to reach a conclusion, as we have done, that existing procedures for collection of support payments are not adequate. It is not as easy to suggest appropriate solutions for the problem. To be effective collection methods must cope with husbands who have little in the way of assets or who have competing claims to inadequate incomes; with husbands who can move from job to job or who can take steps to place assets and incomes beyond the reach of the usual legal collection machinery; and husbands who are willing to undergo great personal inconvenience to avoid paying.

One response to the problem of collection would be to place the primary responsibility for support of deserted wives and children upon the Department of Health and Social Development. The Department would then undertake the responsibility of recovering support payments from the husband. Proceedings would be taken in the name of the Department and any deficiency in the amount collected would be borne by the Department.

A more extreme proposal would be to remove the matter entirely from the courts. An administrative agency could assess the wife's need and make payments to her accordingly. The agency could also assess the husband's ability to pay and require him to pay that amount to the agency, with any deficiency being borne by the agency. The agency would take the entire responsibility for collection.

A proposal of this kind would have virtue. A wife would no longer suffer from a husband's inability or refusal to perform his obligations. There would be no more bitter clashes between them over collection, and the wife would not have to waste time and money in collection procedures. If she were paid according to need and he were assessed according to ability to pay, the distressing problems arising from insufficiency of income would be solved.

However, we do not now feel able to recommend such a proposal. Our understanding of present practice is that if a wife qualifies for social assistance the Department of Health and Social Development will pay the wife what she needs and look to the husband to pay the amount awarded by the court; and we are not satisfied that there should be a transfer to government of the responsibility of providing support to wives who do not qualify for social assistance; nor are we in a position to forecast the cost. We see other difficult questions. The wife might well think it wrong if the system should restrict her to a standard of living below that which her husband could afford. Should a wife be supported at the level at which her husband should support her? Wives receiving less because they have received less in the past might well complain about discrimination in the

use of public funds. Would it be in the public interest for such a plan to apply to everyone, or should the wife have the choice of looking directly to her husband for payment? It does not seem proper to require anyone to seek government assistance who does not want it, but if such a system is not to apply to everyone it seems that any improvement which is socially desirable can be made through the existing system.

If wives cease to have any inducement to see that support payments are collected, it seems likely that a substantial government organization would have to be set up in order to see to collections. If husbands are not to pay the whole of what their wives are to receive they are not likely to be interested in what the total payment should be, and negotiated settlements could not be relied upon. Settlements are important in enabling the courts to keep up with their work and we are not able to forecast the consequence if an assessment has to be made in every case. If a court is ostensibly deciding what the husband should pay for the wife's benefit but is in fact deciding what the husband should pay for the government's benefit, the procedure would be a fiction.

In view of the distressing problems of collection, WE INVITE COMMENT on these proposals.

We turn now to a discussion of specific means of enforcement of orders for support payments.

While enforcement of Supreme Court support orders by seizure and sale under writ of execution is often impracticable, we see no reason to abolish it. We do not see any

easy reform of the procedure and we do not think we should attempt any fundamental analysis in the context of matrimonial support.

There is something to be said for a more effective garnishment procedure. The drawbacks which can be relieved against arise from the fact that a particular garnishee summons can be used only once. If it had continuing effect it would be less costly and it could attach future wages or salary.

Saskatchewan legislation provides one suggestion. Under its Attachment of Debts Act, a maintenance order may be served on the respondent spouse's employer who must then deduct from each succeeding pay cheque and pay into court enough to meet the maintenance payments. English legislation provides another suggestion. Under the Attachment of Earnings Act, 1971 (U.K.), if the respondent spouse fails to pay, and if his failure is due to his wilful refusal or culpable neglect, the court may order the employer to deduct and pay to a court officer a periodic amount determined by the court. The court will, however, determine a minimum amount of "protected earnings" which are to go to the respondent spouse before any deduction is made.

Each of these collection methods would be more efficient than the garnishee summons. Our tentative opinion is that the automatic operation of the Saskatchewan statute is likely to produce hardship, particularly if there should be a sudden change in the respondent spouse's earnings or if there should be other substantial deductions or competing claims such as those of a second family dependent on the same earnings. We see more merit in the English statute since it comes into operation only upon default and

the court can consider the problems of the individual case. Powers similar to those granted by either statute could be conferred upon the Family Court as well as upon the Supreme Court.

Another alternative which would avoid some of the problems of automatic attachment would be to provide for the appointment of a receiver to receive wage payments from the husband's employer, or, for that matter, other money payable to the respondent spouse. The appointment would be made only if there is default or if there is reason to fear default. Such a provision would have the advantage that someone would administer it and it would not operate blindly. But we see some problems here also. The receiver would, we think, have to be a Family Court officer charged with enforcement of orders for support. We are inclined, however, to view the appointment of a receiver as a Supreme Court matter both for constitutional reasons and because we believe it to be appropriate. In cases in the Supreme Court, this would not give rise to any difficult problem, but in Family Court matters it would make it necessary to apply to another court, which is undesirable. We have not resolved these problems.

If any improved procedure for attachment of wages or salary should be adopted the employer should be prohibited from discharging the employee merely because of the attachment. As we have said at page 60 such a prohibition now applies to garnishment and it should apply to any form of attachment of wages.

WE INVITE COMMENT on these proposals for improvement of the procedure to attach salary or wages.

Some provinces allow the court to require the respondent spouse either to deposit in court a designated sum to secure the fulfillment of the order, or to give a bond in a designated amount. The bond is conditioned on fulfilment of the orders and sureties may or may not be required. Failure to comply may render the respondent spouse liable to imprisonment. If the security is a deposit of money, the claimant spouse may upon default apply to the court for part of the deposit. If the respondent spouse is required to keep the deposit up to the amount ordered, the deposit will protect the claimant spouse for a period of time during which efforts can be made to find the respondent spouse and to collect the amounts in default. Subject to a strong dissent by one of our members, we are tentatively of the opinion that both the Supreme Court and the Family Court should have power to require a bond or deposit, but only where it is demonstrated to the court that the husband has defaulted or is likely to default and that he has the resources to put up the deposit or bond. We think that there should be a maximum amount to be secured by deposit or by bond, and we suggest that the maximum be three months' maintenance at the rate provided for in the order.

WE INVITE COMMENT.

Another way to enforce collection is imprisonment, or the threat of imprisonment. The Supreme and District Courts may commit a respondent spouse to gaol if he had sufficient means or ability or resources to pay alimony and has refused or neglected to pay. The imprisonment may be for any period up to a year. A Family Court judge by the combined effect of section 28 of the Domestic Relations Act and Part XXIV of the Criminal Code may commit the husband for any period up

to six months. Imprisonment for non-payment of money is generally regarded as repugnant to present notions of justice, and most of the relevant arguments apply here. There is the further argument that the husband cannot while imprisoned earn money to pay the wife. However, in the absence of a better means of enforcement we do not propose that imprisonment be abolished. We believe that wilful failure to maintain the claimant spouse amounts to a personal breach of a higher duty than is owed to ordinary creditors, and the difficulties involved in collecting small periodic payments make it necessary to have extra-ordinary remedies.

Another remedy which may have value in some cases is the registration of the support order against land owned by the respondent spouse. Section 21 of the Domestic Relations Act gives such a right in the case of Supreme Court orders for alimony (but not maintenance). Registration of the order binds the respondent spouse's interest in any land in the land registration district and operates as the registration of a charge by the respondent spouse of a life annuity on the land. The section is defective in that it does not make any provision for a variation or partial discharge of the order. We are tentatively of the opinion that Supreme Court support orders should be registrable, but only on the direction of the court and when it is desirable to have a form of security for the obligation to pay. The registration should be subject to variation, discharge, or partial discharge on the application of either party. Under the present law valuable real property can be tied up indefinitely in order to secure support payments which are small in relation to the value of the land and which the husband has paid and will continue to pay, and we think that such cases should

be guarded against. We are also tentatively of the opinion that the court should expressly be empowered to order a sale of the land and to give directions for disposition of the proceeds. The court should have power to establish a receivership of the proceeds and order payment of income or capital to the claimant spouse under the order for support. It should be clear that the sale of the property would not itself operate as satisfaction of the maintenance obligation, whether as to arrears or as to future payments. The amended provisions should apply to any existing registrations.

We are divided on the question whether the Family Court should have the same powers. On the one hand, the Family Court is not used to dealing with matters of property and the protection order procedure does not lend itself to the necessary inquiries. On the other hand, the remedy is as valuable in one case as in the other, and as a general matter a litigant should not be encouraged to go to one court in order to get a more efficient remedy than he can get in another. We welcome discussion of the point.

In some cases it may not be possible to locate the husband but it may be possible to locate some property or assets belonging to him. In these cases, we believe that the Supreme Court should be able to order maintenance payments to be made from the property or assets. It appears to us that the existing sections 9 to 11 of the Public Trustee Act providing for sale of a missing person's property under court order and the payment by the Public Trustee of amounts necessary for the wife's support are reasonably satisfactory, but WE INVITE COMMENT.

We also raise here for discussion the proposal that the claimant spouse be entitled to file a Family Court order

in the Supreme Court and that it should then be enforceable as an order of the Supreme Court. Such a provision would be similar to that under which a judgment under the Small Claims Act can be filed in the District Court with like result. The claimant spouse would then have available the full range of enforcement procedures, and it may be thought appropriate that all remedies should be available no matter where the order was obtained. On the other hand, the proposal would tend to deprive the Supreme Court of control over its own process; and it may be better to make appropriate enforcement machinery available in the Family Court.

It is desirable to make efficient legal procedures available for collection of support payments. It is also desirable that the claimant spouse be able to seek the help of the court or that court officials take primary responsibility for collections. Such officials are attached to the larger Family Courts. We are of opinion that the development of collection departments within the Family Court should continue and that court officials should assist claimants in collecting support payments through such improved procedures as may result from our final Report. We believe that such assistance is socially desirable, and it has so far paid for itself in savings to the Department of Health and Social Development.

WE INVITE COMMENT.

8. Disposition of Property to Defeat Support Payments

The next question is what should be done when a respondent spouse decides to dispose of his property or assets in order to prevent the claimant spouse from collecting support payments. The Divorce Act does not deal with such a case. The Supreme Court now has power under section 20 of the

Domestic Relations Act to grant an injunction to prevent any apprehended disposition by the defendant of his real or personal property. It can also commit the husband to gaol for contempt if he has disposed of property in order to avoid compliance with an order for support. England has gone further and has empowered the High Court to set aside dispositions of property intended to defeat the claimant spouse and to give such directions as are necessary to give effect to the order, and it may be suggested that Alberta should do likewise. The setting aside of a disposition is a very drastic remedy affecting not only the respondent spouse but the person who received the property. We do not think that a purchaser in good faith should be disturbed, and there may be cases in which it is unjust to disturb even the donee of a gift. An alternative might be to allow the court to charge the property in the hands of the present owner with the alimony payments. Powers of this kind would be given only to the Supreme Court.

WE INVITE COMMENT.

9. Priority in Relation to Other Claims

We raise for consideration the question whether unsecured support payments should rank equally with other unsecured claims against the respondent spouse, or whether one or the other should be preferred. The question is important in bankruptcy. It is also important in other cases where the claims against a fund exceed the fund, e.g., when amounts collected by execution or garnishment are not enough to pay all creditors who have writs of execution against the debtor.

It can be argued that the duty owed to the other spouse is higher than the duty owed to outside creditors

and that the law should therefore give preference to the other spouse's claim for support. It can also be argued that the spouse's need will usually be greater and should be preferred to that of the outside creditor. On the other hand, the general rule is that the claimant spouse is entitled to support only according to the means of the respondent spouse and it may be argued that outside creditors should not have to make a forced contribution to the spouse of their debtor so that in most cases the claim for support should not come ahead of other creditors and might even be deferred to them. In the case of bankruptcy we see no reasons to change the present law, which gives continuing protection to the spouse without causing prejudice to other creditors.

WE INVITE COMMENT.

10. Relationships other than Valid Marriages

Sometimes parties have entered into marriage under a law which permits polygamy. If the husband and "wife" later come to Canada, she cannot claim support. The British Columbia case of Lim v. Lim, [1948] 2 D.L.R. 153 so holds. In recent years the trend in England has been toward recognition of polygamous marriages. The Matrimoniaal Proceedings (Polygamous Marriages) Act 1972 says that the court "shall not be precluded from granting matrimonial relief [which includes support] by reason only that the marriage in question was entered into under a law which permits polygamy". Our tentative opinion is in accord with the principle of this legislation.

In many cases, a woman who has lived with a man for a long period of time without having gone through a form

of marriage is in much the same position as a wife. Under these circumstances, it has seemed fair to some that she should have the same right to support as does a legally married wife. For example, the Manitoba Wives and Children's Act allows a woman who has lived with a man for a year and who has had a child by him to apply for support; and the British Columbia Family gives the support rights of a "spouse" to a man or woman where the couple, though not married to each other, have lived together as husband and wife for two years. In each case application must be made within a year from the termination of cohabitation. The Ontario Law Reform Commission in its recent report on Family Property Law at page 403 recommends, in effect, that after two years of living together unmarried couples should, while they continue to live together, have the same mutual liability for maintenance as would married couples.

Despite these examples, we are not persuaded that the law relating to support should extend to such cases. A husband and wife have agreed to enter into a relationship which is generally understood to carry with it the support obligation. A couple by merely living together have not necessarily agreed to any such thing and, indeed, may well have chosen not to become involved in the rights and obligations of marriage.

WE INVITE COMMENT.

IV. WIFE'S RIGHT TO PLEDGE HER HUSBAND'S CREDIT

The law presumes that a wife who lives with her husband and manages the household is entitled to pledge

his credit for the household necessaries required by their style of life. The husband may, by consent or by ratifying her actions, find himself liable for other things as well. The presumption extends to other relationships under which a woman attends to the domestic management of a household. There are various circumstances under which the supplier cannot rely on the presumption. For example, the husband may be able to show that the supplier relied on the wife's credit; that the husband had warned the supplier not to grant credit to the wife; or that the wife had had a sufficient supply of money to pay for the goods. It is not entirely clear whether the husband can deny liability on the grounds that without the supplier's knowledge he forbade the wife to pledge his credit.

Our tentative opinion is that the presumption should be abolished. We see no reason why a supplier should not be in the same position in relation to a wife as he is in relation to any other purported agent. The remedies proposed for the wife elsewhere in this Working Paper should, we think, be sufficient for her own protection, and a supplier can protect himself by asking for evidence of a wife's authority to bind her husband.

A wife who is living apart from her husband for just cause and who has no way of obtaining the necessaries of life may pledge her husband's credit to obtain them either directly or by borrowing for that purpose. She is said to be an agent of necessity. The husband may escape liability if the supplier relied on the wife's credit, or if the husband has allowed her adequate maintenance, or if she has other means, or if she has forfeited her right to support.

Our tentative opinion is that the law should be changed so as to eliminate the right to pledge the husband's credit for necessaries. We are not aware that suppliers of necessaries rely on such an imperfect remedy, and a wife has access to the courts for an order for support on short notice, so that we do not see a useful function for it.

There is a question as to what should be done with sections 13 and 19 of the Domestic Relations Act. Before 1973 section 13 provided that a husband was not liable for his wife's contracts after judicial separation unless he defaulted in payments of alimony, in which case he was liable for necessaries supplied for her use. Section 19 provided that where there was a subsisting alimony order and the husband was not in arrears he was not liable for necessaries supplied to his wife; the agency of necessity presumably applied if he was in arrears. In 1973 the sections were amended to apply equally to a wife's support of her husband.

Our tentative opinion is that the law should expressly exonerate a spouse from liability in the circumstances in which these sections apply, and that the law should not expressly make him liable for necessaries supplied to the claimant spouse when the support payments are in default, because he will be in any event liable for the payments themselves.

In conclusion may we repeat the invitation to express an opinion on the questions we have raised and also on any others that occur to the reader and that are pertinent to

this subject. The opinions which we have expressed are truly tentative and will be re-examined in the light of the opinions and comments which we receive.

May 31, 1974

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NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this Report.

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